

No. 12121

United States
Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

BENJAMIN W. McNAIR,
Appellee.

Apostles on Appeal

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED
FEB 25 1949

PAUL R. O'BRIEN,
CLERK

No. 12121

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.
BENJAMIN W. McNAIR,
Appellee.

Apostles on Appeal

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Decree	13
Amended Findings and Conclusions.....	10
Answer	6
Appeal:	
Certificate of Clerk to Apostles on.....	23
Notice of	14
Order Extending Time for Docketing Record on	18
Order Granting Petition for.....	17
Order Transmitting Original Exhibits on....	19
Petition on	15
Praecept for Apostles on.....	21
Statement of Points and Designation of Record on (U.S.C.A.).....	102
Stipulation Extending Time for Docketing Record on	18
Stipulation and Order Transmitting Original Exhibits on	19

	PAGE
Assignments of Error.....	16
Certificate of Clerk to Apostles on Appeal....	23
Decree, Amended	13
Decision of Court, rendered April 21, 1948....	98
Designation of Record, Statement of Points and (U.S.C.A.)	102
Docket Entries	2
Findings and Conclusions, Amended.....	10
Libel	4
Names and Addresses of Proctors.....	1
Notice of Appeal.....	14
Order Extending Time for Docketing Record	18
Order Granting Petition for Appeal.....	17
Order Transmitting Original Exhibits.....	19
Petition on Appeal.....	15
Praecipe for Apostles on Appeal.....	21
Statement of Points and Designation of Record (U.S.C.A.)	102
Stipulation Extending Time for Docketing Record	18
Stipulation and Order Transmitting Original Exhibits	19

Transcript of Testimony and Proceedings....	24
---	----

Exhibits for Libelant:

1—Certificate of Fitness.....	63
3—Letter dated October 23, 1946, from Division of Insurance, U. S. Maritime Commission to Proctors for Libelant.....	92
4—Letter dated March 25, 1947, from Division of Insurance, U. S. Maritime Commission to Proctors for Libelant.....	93

Exhibits for Respondent:

A-2—Claim of Libelant to U. S. Maritime Commission	68
A-3—Letter from Proctors for Libelant, dated Feb. 10, 1947, to Division of Insurance, U. S. Maritime Commission, enclosing Abstract of Clinical Record from Marine Hospital, Seattle.....	69

Witnesses for Libelant:

MacKay, Hunter J.

—direct	25
—cross	36
—redirect	44

McNair, Benjamin W.

—direct	46
—cross	64, 83
—redirect	89

McNair, Leo J.

—direct	94
---------------	----

Witnesses for Respondent:

Wagner, Jacob C.

—direct	72
—cross	81

NAMES AND ADDRESSES OF PROCTORS

J. CHARLES DENNIS and

FRANK PELLEGRINI,

Proctors for Appellant,
1017 U. S. Court House,
Seattle 4, Washington.

BASSETT & GEISNESS,

Proctors for Appellee,
811 New World Life Bldg.,
Seattle 4, Washington. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court for the Western
District of Washington, Northern Division

No. 15102

BENJAMIN W. McNAIR,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

Cause tried before the Hon. John C. Bowen,
U. S. District Judge.

DOCKET ENTRIES

1947

Sept. 4—Filed Libel.

Sept. 12—Filed sworn return of service.

Nov. 21—Filed exceptions of Respondent, United
States of America to Libel in Personam.

Nov. 25—Filed affidavit of John Geisness in re-
sponse to exceptions.

Nov. 25—Filed notice of hearing Respondent's ex-
ceptions 12/1/47 10 a.m.

Dec. 1—Filed Memorandum of Authorities.

Dec. 1—Ent. order continuing hearing on excep-
tions one week. Briefs to be filed by Dec.
5, 1947.

Dec. 3—Filed Memorandum of Libelant.

Dec. 8—Ent. record of hearing on exceptions.
Cont. to 12/13/47 for further hearing.
Additional briefs to be filed by 12/12/47.

1947

Dec. 13—Ent. record of hearing on exceptions. Ent. order overruling exceptions. Dec. 29, 1947, 10 a.m. set for settling order and carrying out Court's ruling.

Dec. 13—Filed supplemental Memo. of Libelant.

Dec. 26—Filed Order overruling Respondent's exceptions.

1948

Mar. 1—Filed Answer of Respondent, U. S. A.

Mar. 2—Ent. order for Trial. April 20, 1948, 10 a.m.

Apr. 20—Filed Libelant's Trial Memorandum. [2]

Apr. 20—Filed Libelant's Supplemental Trial Memo.

Apr. 20—Ent. Record of Trial, Court, Exhibits.

Apr. 21—Ent. Record of Trial, Court, Exhibits.

Apr. 21—Court renders oral decision in favor of Libelant in the sum of \$1,525.00 and Costs.

Apr. 21—Ent. order setting May 3, 1948, 10 a.m. for settling Findings of Fact, Conclusions of Law and Judgment.

May 3—Filed Findings of Fact and Conclusions of Law.

May 3—Filed Statement of Costs and Disbursements to be Taxed Against Respondent, \$37.20.

May 3—Filed and Entered Decree in favor of Libelant against Respondent in the sum of \$1,550.00 together with Costs, \$37.20.

July 13—Filed Stipulation.

1948

July 13—Filed Order Vacating Findings of Fact, Conclusions of Law and Judgment and Decree.

July 13—Filed Amended Findings of Fact and Conclusions of Law.

July 13—Filed and Entered Amended Decree.

Sept. 17—Filed Defendant's Notice of Appeal.

Sept. 17—Filed Assignments of Error.

Sept. 17—Filed Petition on Appeal.

Sept. 17—Filed Order Granting Petition for Appeal.

Oct. 27—Filed Stipulation and Order extending time for filing Record on Appeal and docketing cause.

Dec. 2—Filed Court Reporter's Transcript of Proceedings.

Dec. 2—Filed Praecipe for Apostles on Appeal.

Dec. 2—Filed Stipulation and Order Transmitting Original Exhibits. [3]

[Title of District Court and Cause.]

LIBEL BY SEAMAN, WITHOUT PREPAYMENT OF COSTS, UNDER THE SUITS IN ADMIRALTY ACT TO RECOVER WAR RISK INSURANCE BENEFITS

For cause of action the libelant alleges:

I.

At all times herein mentioned the S.S. "William Sharon" was a merchant vessel operated for the United States of America by the War Shipping

Administration. On December 28, 1944 libelant was employed as a fireman and water-tender aboard said vessel pursuant to engagement under articles and was at all times herein mentioned an insured under the Second Seamen's War Risk Policy established by Maritime War Emergency Board decision I-a, as amended and supplemented.

II.

On said date, while libelant was in the course of said employment and while said vessel was at Mindoro, Philippine Islands, said vessel was struck by Japanese military planes carrying bombs and libelant was struck in his right shoulder near the base of his neck by a metal fragment from one of said exploding bombs and as a direct and proximate result of said injury libelant has been at all times since said injury and always will be continuously and totally disabled from performing any and every kind of duty pertaining to said occupation in which he was engaged at the time of said injury. [4]

III.

Libelant and the United States Maritime Commission, through its duly authorized division of insurance, are in disagreement as to libelant's right to benefits under the Second Seamen's War Risk Policy, as amended, by virtue of said injuries sustained by him.

IV.

Libelant now elects to receive \$5,000.00 in a lump sum but has not heretofore made such an election.

V.

All and singular the premises are true and within the admiralty jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant claims the sum of \$5,000.00 and further prays for such other and different relief as to the court may appear just and proper.

BASSETT and GEISNESS,
JOHN GEISNESS,
Proctors for Libelant.

(Duly Verified.)

[Endorsed]: Filed Sept. 4, 1947.

[5]

[Title of District Court and Cause.]

ANSWER

Comes Now the respondent, United States of America, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and Frank Pellegrini, Assistant United States Attorney for said District, and for answer to the Libel in Personam herein, admits, denies and alleges as follows:

I.

Answering paragraph I of the libel herein, respondent admits the allegations thereof.

II.

Answering paragraph II of the libel herein, respondent admits that the S.S. William Sharon was attacked by Japanese military planes on December 28, 1944.

Further answering said paragraph, respondent alleges it does not have sufficient information on which to form a belief as to whether or not libelant received any injuries as a result of the attack of said vessel by enemy planes and therefore denies each and all of the allegations relating thereto.

Further answering said paragraph, respondent denies libelant has been and will be totally and continuously disabled from performing any and every kind of duty pertaining to the occupation in which he was engaged at the [6] time of the said injury.

III.

Answering paragraph III of the libel herein, respondent denies the allegations thereof except as hereinafter admitted.

Further answering said paragraph, respondent alleges that on or about September 6, 1946, libelant filed a claim with the United States Maritime Commissioner, successor to the War Shipping Administration; that thereafter by letter of October 23, 1946, the said agency requested further information relative to libelant's condition; that by letter dated February 10, 1947, the libelant furnished additional information, which letter the Maritime Commission answered by letter dated March 25, 1947; that copies of all of the aforesaid correspondence are in the possession of libelant.

IV.

Answering paragraph IV of the libel herein, respondent admits the allegations thereof and alleges that the terms and conditions of the Second

Seamans Policy of War Risk insurance are determinative of libelant's right to make an election.

V.

Respondent denies each and every allegation of paragraph V of the libel herein.

Further Answering the said libel, and as a separate defense thereto, respondent alleges as follows:

I.

That on December 28, 1944, libelant was a member of the crew of the S.S. William Sharon, a merchant vessel operated for the United States of America, by the War Shipping Administration. That on said date there was in full force and [7] effect for the benefit of libelant, the Second Seaman's War Risk policy.

II.

That on December 28, 1944, the said S.S. William Sharon was attacked by Japanese military planes and disabled and some of the members of the crew aboard the said vessel were injured. That respondent does not now have sufficient information upon which to form a belief as to whether or not libelant herein received any injuries as a result of the attack of said vessel by enemy planes.

III.

That subsequent to the enemy attack on the S.S. William Sharon, the libelant was repatriated aboard the S.S. David Hewes, arriving in the United States at San Francisco, California on March 2, 1945.

IV.

That libelant herein did not file a claim on account of alleged injuries or disability with the United States Maritime Commission, successor to the War Shipping Administration until September 6, 1946.

V.

That the action herein was filed on September 4, 1947 and served on the United States Attorney on said date.

VI.

That the said action was not timely commenced and is barred.

VII.

That the libelant did not file a claim for disability within the time required by the provisions of said policy of insurance and said action herein is barred. [8]

Wherefore, respondent prays that the libel may be dismissed with costs and for such other and further relief as may be just.

J. CHARLES DENNIS,
United States Attorney.
FRANK PELLEGRINI,
Assistant U. S. Attorney.

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed March 1, 1948.

[9]

[Title of District Court and Cause.]

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause came regularly before the court on Tuesday, the 20th day of April, 1948, the libelant being present in person and represented by John Geisness of Bassett & Geisness, his proctors, and respondent being represented by J. Chas. Dennis and Frank Pellegrini, its proctors, and the court having considered the records and files herein, evidence adduced by and on behalf of the respective parties and the stipulations and arguments of counsel, and being fully advised in the premises, now makes the following

FINDINGS OF FACT

I.

At all times herein mentioned the S.S. "William Sharon" was a merchant vessel operated for the United States of America by the War Shipping Administration. On December 28, 1944 libelant was employed as a fireman and water-tender aboard said vessel pursuant to engagement under articles and was at all times herein mentioned an insured under the Second Seamen's War Risk Policy established by Maritime War Emergency Board decision 1-a, as amended and supplemented. Libelant is now twenty-one years of age.

II.

On said date, while libelant was in the course of said [10] employment and while said vessel was

at Mindoro, Philippine Islands, said vessel was struck by Japanese military planes carrying bombs and libelant was struck in his right shoulder by a metal fragment from one of said exploding bombs and as a direct and proximate result of said injury libelant was continuously and totally disabled from performing any and every kind of duty pertaining to said occupation in which he was engaged at the time of said injury for a period of one year from and after March 2, 1945, the first date upon which libelant arrived in the continental United States following said injury.

Libelant filed with the United States Maritime Commission between October 9, 1946 and October 23, 1946 a claim for benefits under said Second Seamen's War Risk Policy by reason of the above-mentioned injury and disability. Said Maritime Commission thereupon requested further information, including medical findings, and, after receiving such further information, said Commission, by letter dated March 25, 1947, rejected said claim on the merits but invited a further application for consideration should libelant have further periods of disability. No objection was ever made by said Commission to the timeliness of said claim until respondent filed exceptions in the above entitled cause.

IV.

As a direct and proximate result of said injuries, libelant has been and is permanently and partially disabled to an extent equal to 10% of the amputation of his right arm at the shoulder.

V.

All and singular the premises are true and within the admiralty jurisdiction of the United States and of this Court.

From the foregoing Findings of Fact the Court makes the following [11]

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties to and subject matter of this action.

II.

Libelant is entitled to recover the sum of \$1,800.00 for said disability during said period of one year from and after March 2, 1945 and the additional sum of \$325.00 for said permanent partial disability, besides libelant's costs of suit.

Done In Open Court this 13th day of July, 1948.

JOHN C. BOWEN,
Judge.

Presented by:

JOHN GEISNESS,
Of Proctors for Libelant.

Approved as to form:

FRANK PELLEGRINI,
Of Proctors for Respondent.

In the District Court of the United States for the
Western District of Washington, Northern Division

In Admiralty—No. 15102

BENJAMIN W. McNAIR,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

AMENDED DECREE

The above cause came regularly before the court upon stipulation of libelant and respondent, through their respective proctors, from and by which it appears that the decree made and entered in said cause May 3, 1948 should be changed and that an amended decree should be entered, and it is now, therefore,

Ordered, Adjudged and Decreed that libelant have and recover of and from the respondent United States of America the sum of \$2,125.00, together with his costs of suit hereby taxed in the sum of \$37.20.

Done In Open Court this 13th day of July, 1948.

JOHN C. BOWEN,

Judge.

Presented by:

JOHN GEISNESS,

Of Proctors for Libelant.

Approved as to form:

FRANK PELLEGRINI,

Of Proctors for Respondent.

[Endorsed]: Filed July 13, 1948.

[13]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Benjamin W. McNair, libelant, and Bassett & Geisness and John Geisness, his proctors; and to The Honorable John C. Bowen, Judge, and Millard P. Thomas, Clerk of the above entitled Court:

You and each of you will please take notice that the United States of America, respondent in the above entitled cause, hereby appeals from that certain Amended Judgment and Decree entered on the 13th day of July, 1948, in the above entitled cause, wherein the Court ordered, adjudged and decreed that the libelant recover judgment against the United States of America in the sum of \$2,125.00, together with his costs of suit taxed in the sum of \$37.20, hereby appealing from the whole of the said decree and particularly each and every part thereof granting to the libelant a recovery on account of the allowance of disability payments on the said Second Seamen's War Risk Policy of insurance from and including August 13, 1945 to March 2, 1946, unto the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 20th day of August, 1948.

FRANK PELLEGRINI,
Assistant U. S. Attorney.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 17, 1948.

[14]

[Title of District Court and Cause.]

PETITION ON APPEAL

To The Honorable Judges of the Above Entitled Court:

Comes now the United States of America, respondent in the above entitled cause, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and Frank Pellegrini, Assistant United States Attorney for said District, and being aggrieved by that certain final order, to-wit: the amended judgment and decree signed, filed and entered in the above cause on July 13, 1948, hereby claims an appeal therefrom to the United States Circuit Court of Appeals for the Ninth Circuit, and hereby prays that such appeal may be allowed forthwith by order of the above entitled Court without issuance of citation upon said respondent's notice of appeal and assignments of error heretofore filed and duly presented herewith.

Dated this 20th day of August, 1948.

J. CHARLES DENNIS,
United States Attorney.
FRANK PELLEGRINI,
Assistant U. S. Attorney.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 17, 1948.

[15]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Respondent, United States of America, hereby respectfully assigns error in the proceedings before the Court and in the Amended Judgment and Decree entered and filed on the 13th day of July, 1948, as follows:

1. That the Court erred in awarding to libelant on the Second Seamen's War Risk Policy of insurance, a recovery in the total sum of \$2,125.00.

2. That the Court erred in allowing the libelant to recover disability payments on the said Second Seamen's War Risk Policy of insurance for period from and including August 13, 1945 to March 2, 1946.

3. That the Court erred in allowing the plaintiff any recovery whatsoever in excess of \$1,140.00 on said Second Seamen's War Risk Policy of insurance.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ FRANK PELLEGRINI,
Assistant U. S. Attorney.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 17, 1948.

[16]

[Title of District Court and Cause.]

ORDER GRANTING PETITION
FOR APPEAL

The above entitled cause having duly and regularly come on for hearing before the above entitled Court, the undersigned Judge presiding upon petition for appeal of respondent, United States of America, presented to this Court with said respondent's notice of appeal and assignments of error heretofore filed this day, and the Court having considered the same, now, therefore, it is hereby

Ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Amended Judgment and Decree heretofore entered and filed on the 13th day of July, 1948, be and the same is hereby allowed.

Done In Open Court this 17th day of September, 1948.

JOHN C. BOWEN,
United States District Judge.

Presented by:

FRANK PELLEGRINI,
Assistant United States Attorney.

Notice of presentation of the within and foregoing order is hereby waived.

BASSETT & GEISNESS,
By /s/ DUANE VANCE,
Proctors for Libellant.

[Endorsed]: Filed Sept. 17, 1948.

[17]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the appellant and appellee in the above entitled cause that the time allowed appellant for filing the record on appeal and for docketing said cause with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and it is hereby extended to and including the 15th day of December, 1948.

/s/ BASSETT & GEISNESS,
By /s/ JOHN GEISNESS,
Attorneys for Appellee.

J. CHARLES DENNIS,
United States Attorney.
FRANK PELLEGRINI,
Assistant United States Attorney, Attorneys for
Appellant, United States of America.

[Endorsed]: Filed Oct. 27, 1948.

[18]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING CAUSE

It appearing to the Court that the parties hereto have stipulated to extend appellant's time for filing the record and docketing said cause in the United States Circuit Court of Appeals for the Ninth Circuit, now, therefore it is hereby

Ordered that the time to be allowed appellant for the filing of the record and the docketing of

said cause to the United States Circuit Court of Appeals for the Ninth Circuit be and it is hereby extended to and including December 15, 1948.

Done In Open Court this 27th day of October, 1948.

/s/ JOHN C. BOWEN,
United States District Judge.

Notice of presentation waived:

/s/ JOHN GEISNESS,
Attorney for Appellee.

Presented by:

FRANK PELLEGRINI,
Assistant United States Attorney.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 27, 1948. [19]

[Title of District Court and Cause.]

STIPULATION AND ORDER TRANSMIT-
TING ORIGINAL EXHIBITS

It Is Hereby Stipulated and Agreed by and between the parties hereto through their proctors of record undersigned that the following original exhibits may be transmitted by the Clerk of the above Court to the United States Circuit Court of Appeals for the Ninth Circuit as part of the record on appeal:

Libelant's Exhibit 1, Certificate of Fitness;

Libelant's Exhibit 3, Letter dated October 23, 1946 from Division of Insurance, U. S. Maritime Commission to proctors for libelant;

Libelant's Exhibit 4, Letter dated March 25, 1947, from Division of Insurance, U. S. Maritime Commission to proctors for libelant.

Respondent's Exhibit A-1, X-ray;

Respondent's Exhibit A-2, Libelant's claim to U. S. Maritime Commission;

Respondent's Exhibit A-3, Letter from proctors for libelant, dated February 10, 1947, to Division of Insurance, U. S. Maritime Commission enclosing abstract of clinical record from Marine Hospital, Seattle;

Respondent's Exhibit A-4, Hospital Records, Marine Hospital, Seattle.

Dated at Seattle, Washington this 29th day of November, 1948.

/s/ BASSETT & GEISNESS,
Proctors for Libelant.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ FRANK PELLEGRINI,
Assistant U. S. Attorney.

It is so Ordered.

Done In Open Court this 2nd day of December, 1948.

/s/ JOHN C. BOWEN,
United States District Judge.

[Endorsed]: Filed Dec. 2, 1948.

[20]

[Title of District Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL

To the Clerk of the Above Entitled Court:

Utilizing the Transcript of the Record filed herewith, you are hereby requested to prepare in the above entitled cause Apostles on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, supplementing and comparing the transcript to the extent necessary to make index, and certify full, true and complete Apostles on Appeal as required by the Admiralty Rules of that Court containing the following:

1. Caption showing proper style of the Court and showing title and number of the cause.

2. Introductory statement showing time of commencement of the cause, names of all parties, names and addresses of all proctors, dates of filing of various pleadings, name of trial Judge, date of trial, date of final decree, date when Notice of Appeal filed and date of Order allowing appeal.

3. The Libel.

4. Respondent's Answer.

5. All testimony of all witnesses taken in open court with all exhibits in connection with such testimony including the following exhibits:

(a) Libelant's Exhibit 1—Certificate of Fitness.

(b) Libelant's Exhibit 3—Letter dated October 23, 1946 from Division of Insurance, U. S. Maritime Commission to proctors for libelant. [21]

(c) Libelant's Exhibit 4—Letter dated March 25, 1947, from Division of Insurance, U. S. Maritime Commission, to proctors for libelant.

(d) Respondent's Exhibit A-1—X-ray.

(e) Respondent's Exhibit A-2—Libelant's claim to U. S. Maritime Commission.

(f) Respondent's Exhibit A-3 — Letter from proctors for libelant, dated February 10, 1947, to Division of Insurance, U. S. Maritime Commission, enclosing abstract of clinical record from Marine Hospital, Seattle.

(g) Respondent's Exhibit A-4 — Hospital Records, Marine Hospital, Seattle.

6. Court's Decision rendered April 21, 1948.

7. Amended Findings of Fact and Conclusions of Law entered and filed July 13, 1948.

8. Amended Judgment and Decree entered and filed July 13, 1948.

9. All notices, motions and orders relating to the appeal, including the following:

(a) Notice of Appeal.

(b) Petition on Appeal

(c) Assignments of Error.

(d) Order granting petition for appeal entered and filed September 17, 1948.

(e) Stipulation Extending Time for Filing Record and for Docketing Cause in the Circuit Court.

(f) Order Extending Time for Filing Record on Appeal and Docketing Cause, entered on October 27, 1948.

10. Stipulation and Order Transmitting Original Exhibits.

11. This Praecipe.

J. CHARLES DENNIS,

United States Attorney.

FRANK PELLEGRINI,

Assistant U. S. Attorney. [22]

(Acknowledgment of Service.)

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 23, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same, together with the Reporter's Transcript of Proceedings, the original of which is sent up as a part of the record on appeal, and the original exhibits, constitute the apostles on appeal from the Amended Decree of the United States District Court for the Western District of Washington, at Seattle, filed and entered July 13, 1948, to the United States Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparing apostles on appeal herein, to-wit: [24]

Twenty-two pages at 10 cents (copies furnished), \$2.20; petition for appeal, \$5.00; total \$7.20.

I further certify that the costs of this record on appeal have not been paid to me for the reason

that said appeal is being prosecuted by the United States of America.

I further certify that no citation on appeal has been issued in said cause.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 7th day of December, 1948.

(Seal) MILLARD P. THOMAS,
Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division

In Admiralty—No. 15102

BENJAMIN W. McNAIR,

Libellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

Before: The Honorable John C. Bowen, District Judge.

Seattle, Washington

April 20, 1948—10:00 o'clock a.m.

Appearances: John Geisness, Esq., (Bassett & Geisness), appearing for libellant; J. Charles Dennis, Esq., United States Attorney, and Frank Pellegrini, Esq., Assistant United States Attorney, appearing for respondent. [1 *]

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

PROCEEDINGS

The Court: Are counsel and the parties ready to proceed with the trial of the case of Benjamin W. McNair versus United States of America?

Mr. Geisness: The libelant is ready, if the Court please, although I would like a few minutes to refresh my recollection as to some dates.

Mr. Pellegrini: The respondent is ready, if your Honor please.

(Short recess.)

The Court: You may proceed in the case on trial with the opening statement of libelant.

(Opening statements made on behalf of libelant and respondent respectively.)

The Court: Call the libelant's first witness.

Mr. Geisness: May I call a medical witness first, if your Honor please, a little out of order?

The Court: Yes.

Mr. Geisness: Dr. Mackay. [2]

HUNTER J. MACKAY,

called as a witness by and on behalf of libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Geisness:

Q. Will you state your name, please?

A. Hunter J. Mackay.

Q. What is your occupation?

A. Practicing neuro-surgeon.

(Testimony of Hunter J. Mackay.)

Q. Where? A. City of Seattle.

Q. Are you licensed to practice as a physician in the city of Seattle and the State of Washington?

A. Yes.

Q. For how long have you been so licensed?

A. Since 1938.

Q. Prior to that time did you engage in the practice of your profession? A. Yes.

Q. Where? A. As an interne. [3]

Q. Where did you take your academic work?

A. Western Reserve University, Cleveland, Ohio.

Q. At medical college?

A. At the Medical School there, yes.

Q. Following that, did you serve an interneship, as I understand?

A. Yes. I had an interneship, and five years thereafter training in neuro-surgery.

Q. Where did you serve that interneship?

A. A year of that was in graduate school; a year of that was with Dr. Paul G. Flothow; and three years at the Mayo Clinic.

Q. Have you had any special training for the field in which you work other than that which you have already indicated?

A. Nothing except the type of experience we had in the war with traumatic injuries; that was of this nature.

Q. On August 15th, 1947, did you see and examine Benjamin W. McNair?

A. Yes, I did.

(Testimony of Hunter J. Mackay.)

Q. Where did you see him?

A. At my office on Marion Street.

Q. Here in Seattle, of course? A. Yes.

Q. Did you obtain from him a history?

A. Yes, I did.

Q. And a statement of his complaints?

A. Yes.

Q. Did you also make a physical examination?

A. Yes, I did.

Q. And an X-ray examination? A. Yes.

Q. Would you tell us what your complete examination disclosed concerning Mr. McNair's condition—his history of his complaints and the physical findings?

A. His history was essentially that as previously related to the Court, that he had been injured in the latter part of December, '44, had been returned to the States; that in the interim he had for a period of weeks been unable to use his arm, that it was numb; and that for some few weeks following its injury he thereafter began to enjoy some return of function, both motor and sensory function; that during this time he developed a pain in and about the site of the entrance of the shrapnel, and that this was particularly aggravated in any type of strain such as lifting, pulling and so on.

Q. Where was that site? [5]

A. Just above the collar bone on the right side at the base of the neck, at the root of the neck.

Q. What did your physical examination disclose?

(Testimony of Hunter J. Mackay.)

A. The neurologic findings at that time were consistent with an incomplete and a partial injury to the nerves and the arm—the brachial plexus, in other words. It showed that the reflexes through certain muscle groups were diminished appreciably and that he had a patchy type of loss of sensation throughout the upper extremity.

Q. Was there any change in the muscles of the right arm or shoulder?

A. The extensory of the forearm—the triceps muscle—that is the one on the posterior of the dorsal aspect of the arm. The extent of that was definitely diminished and its reflex was virtually absent.

Q. You spoke of the brachial plexus. Can you tell us more exactly what that is?

A. The brachial plexus is this mass of cords over the neck that runs down to the first rib under your arm. It consists of a number of nerve roots from a portion of the spinal cord into the neck region. These join together in various complex ramifications to enervate various muscles and portions of the skin in the upper extremity. [6]

Q. What do the X-rays disclose?

A. The X-rays showed a small metallic fragment in the region of the first rib on the right side, either just within the chest or just above the first rib; we couldn't be sure.

Q. Could you tell from the X-ray whether that metallic fragment was affecting the brachial plexus?

(Testimony of Hunter J. Mackay.)

A. From the point of entrance and from its final residing place, by inference it would of necessity have had to pass through some of the ramifications of the brachial plexus, yes.

The Court: Will you state again where the brachial plexus is?

The Witness: The brachial plexus is in the side of the neck—these cords in the side of the neck.

The Court: Both sides of the neck?

The Witness: Yes. There is a plexus on either side.

The Court: What is the plexus as related to the nerves?

The Witness: It is a term we use—

The Court: It is not the gangalia, is it?

The Witness: No, sir. Those are the long spinal cord. This is merely a term we [7] use to mean a complex joining together of various nerve trunks.

The Court: Is it the place where they all come together?

The Witness: Yes—

The Court: It is the junction point?

The Witness: It is the junction point.

The Court: Is that what you mean by plexus?

The Witness: By plexus; and then it again ramifies down the arm.

The Court: I am trying to get the concept of plexia.

Does it mean the function of the coming together of a lot of different nerves of different systems or does it mean something else?

(Testimony of Hunter J. Mackay.)

The Witness: Any time we have a junction of nerves that again break up into other branches, we term that a plexus.

The Court: It is not only coming together but it is also the branching out again?

The Witness: Yes; correct. Yes, sir.

The Court: A plexia of nerves or of a certain system of nerves means systems or branches [8] or trees of nerves which are held together in the middle by some central joining system?

The Witness: Yes. I think that would be a good description.

The Court: You may proceed.

Q. (By Mr. Geisness): What were your conclusions as to his condition at that time as to the prognosis and recommended treatment?

A. My opinion at that time was that he had sustained a definite injury to his brachial plexus, that he had fortunately had appreciable improvement; this in view that there was no definitive treatment indicated at the present time either for the brachial plexus injury or removal of the shrapnel, but that at some future date there was a definite possibility that the condition might regress—might become worse.

Q. Would that be the direct result of the fragment of shrapnel or of some other conditions that had resulted from the entrance of the shrapnel?

A. It is more or less a direct result—you might say indirect in that light regression is usually due

(Testimony of Hunter J. Mackay.)

to the contraction of scar tissue along the path of the missile as it entered the body. [9]

Q. At that time, that is in August, 1947, wasn't Mr. McNair handicapped for physical labor by reason of the conditions you found?

A. Yes, at that time he was; he was handicapped.

Q. In what way would that handicap be evidenced?

A. It was evidenced particularly in any maneuver that caused him to strain the muscles of the right shoulder or the right arm—the entire right upper extremity for that matter—duplicated the pain of which he complained previously.

Q. What would be the effect of engaging in activity that resulted in such strain—as of that time, now, I am speaking—in August, 1947?

A. Well, it is rather difficult to surmise any definite organic change other than the mental suffering that he would put up with in the process.

Q. Due to that pain? A. Yes.

Q. At that time was there any impairment of strength in the arm?

A. Yes. There was a slight diminution of strength in the entire right upper extremity.

Q. Would this condition—as it was at the time we have in mind—affect the dexterity with which [10] McNair might use his arm and hand?

A. Yes. Any time there is impairment of the motor function of a part, the dexterity is impaired.

(Testimony of Hunter J. Mackay.)

Q. Would you consider at that time that McNair was able to do such work as, let's say, handling cargo on a ship?

A. It would be difficult—

The Court: What date are you now speaking of?

Mr. Geisness: August 15th, 1947.

A. (Continuing): As I saw him at that time, I generally felt that it would have had to have been done with extreme difficulty if he had tried—attempted.

Q. (By Mr. Geisness): Do you feel you are sufficiently familiar with engine room work on a ship as to give us any idea as to whether he would have been handicapped at that time in the performance of his work?

Mr. Pellegrini: If the Court please, I would like to have the doctor state whether or not he was able to perform his work.

The Court: Sustained. [11]

Q. (By Mr. Geisness): Would it be your opinion that as of that time Mr. McNair was able to engage in heavy manual labor?

A. As I previously indicated, he would have to do so with extreme difficulty and suffering.

Q. Have you seen McNair since August, 1947?

A. Yes; on one occasion.

Q. I think you have already indicated that in August, 1947, you did not feel that any treatment was to be recommended? A. Yes.

Q. Is that correct? A. Yes.

(Testimony of Hunter J. Mackay.)

Q. But rather than you should wait and see what might develop? A. Yes.

Q. At that time, in your opinion, was there a possibility that the condition would improve?

A. Yes.

Q. And also a possibility that it might get worse and regress? A. Yes.

The Court: What date was that?

Mr. Geisness: August 15th, 1947. [12]

Q. (By Mr. Geisness): When did you see him again? A. I saw McNair this morning.

Q. In your office? A. Yes.

Q. Did you examine him this morning?

A. Yes, I did.

Q. What did you find this morning as to his present condition?

A. I found that at the present time, from an objective standpoint — from my standpoint that there has been appreciable improvement in his condition; that whereas the specified reflexes and weakness that had appeared before are now virtually absent, that the meat or power has returned. There is no evidence of muscle shrinkage. He also had some impairment of sensation, which is also much improved.

Q. You spoke of the effect of the condition on his reflexes in August, 1947. Is that something that can be objectively determined? A. Yes.

Q. How about the condition of the muscles which you found in August, 1947—is that something that you can objectively determine or was it just his own statement as to capacity? [13]

(Testimony of Hunter J. Mackay.)

A. No. You can get a fair opinion of a muscle's function as to certain muscle tests—as to whether there is muscle atrophy.

The Court: Was his muscle shrinkage much this morning?

The Witness: No, sir.

Q. (By Mr. Geisness): Was it in August, 1947?

A. No. There was a very slight degree of muscle atrophy.

The Court: That was what in August, 1947?

The Witness: Very slight of the triceps muscle on the right side.

Q. (By Mr. Geisness): At the present time do you think that McNair could engage in hard manual work with his right arm?

A. From an objective standpoint, he could, yes.

Q. Do you mean to intimate that from a subjective standpoint there might be a problem?

A. Yes.

Q. What would that be?

A. The pain that movement and exertion causes him, which of course I have no way of ascertaining. [14]

The Court: You can't measure that?

The Witness: No.

Q. (By Mr. Geisness): Did he complain this morning of pain to you?

A. Yes. He stated he was still suffering the same pain on exertion.

Q. In your opinion is there any permanent partial disability of that arm from the wound he sustained?

(Testimony of Hunter J. Mackay.)

A. He probably will have some permanent partial disability, yes.

Q. Could you measure that in some way?

A. It would be not over 10 per cent, as compared to an amputation at the shoulder.

The Court: He has 10 per cent loss of function or what?

The Witness: Ten per cent disability.

The Court: Ten per cent disability of what—of the shoulder or the muscles at the shoulder, or what?

The Witness: As compared to an amputation of the part at the shoulder.

The Court: What is it that has become disabled to the extent of 10 per cent below normal? [15]

The Witness: Principally the subjective side of this thing, your Honor—the pain which he experiences when he exerts himself in lifting. Function in general of his right upper extremity. In other words, we feel that if he attempts to use that arm for ordinary use in heavy labor, that 10 per cent of its function will be gone.

The Court: The normal function of which arm?

The Witness: The right arm.

The Court: You may inquire.

Q. (By Mr. Geisness): Is that a 10 per cent disability as compared with amputation of the right arm at the shoulder?

A. Yes. We usually determine it in that fashion.

Mr. Geisness: That is all.

(Testimony of Hunter J. Mackay.)

Cross Examination

By Mr. Pellegrini:

Q. Doctor, that 10 per cent disability is a figure that you arrive at based entirely upon complaints made by Mr. McNair, isn't that correct?

A. Yes. [16]

Q. It is not based upon anything that you can find medically from an objective standpoint is it?

A. That is right.

Q. In other words, from a medical standpoint the muscles of Mr. McNair's right arm at the present time are normal in all respects, are they not?

A. Yes.

Q. So that when you say 10 per cent, you base it entirely on the fact that he tells you that he suffers some pain, is that right?

A. That is correct.

Q. Doctor, what is Mr. McNair doing at the present time in the way of work, do you know, sir?

A. I don't know the specific type work. I do know that he has been handling some type of employment in a machine shop or a shop of some similar nature.

Q. He is working around a garage, is he not?

A. Something like that.

Q. Doing mechanical work?

A. He said he was helping his father, I believe.

Q. Did you have occasion to examine his hands, to determine whether or not he had calluses?

A. Yes. We looked at his hands.

Q. And he had calluses on both the right and the left [17] hand, does he not?

(Testimony of Hunter J. Mackay.)

A. Obviously he has been using the right hand, yes.

Q. Judging from the looks of his hands, he has been using the right hand as much as he has the left hand, has he not?

A. Judging it in that fashion—using that as a criterion, you could safely say he has been using it, yes.

Q. Doctor, you stated that you found a slight muscular impairment on August 15th, 1947 with regard to the muscles of his upper arm.

What muscle was that?

A. That was the extensory of the forearm, the triceps muscle.

Q. The triceps muscle? A. Yes.

Q. And just how slight was the muscular impairment, or how great?

A. Again, that is a personal opinion. As I recall, he probably had lost, we will say, 50 per cent of its function at that time. The reflex was virtually absent.

Q. Was the muscle atrophied?

A. No. I have the impression that it was in the process of atrophy. It was not marked, however.

Q. Well, there was no marked atrophy of the muscle whatever then, was there? A. No.

Q. So that when you base your opinion that there was some muscular impairment upon the fact that you thought perhaps it was atrophied, is that it?

(Testimony of Hunter J. Mackay.)

A. No. The fact mainly that his reflex was virtually absent and that it was, as far as we could tell, by our muscle-testing maneuvers—that it was weak.

The Court: And that date was August 15th, 1947?

The Witness: Yes, sir.

Q. (By Mr. Pellegrini): On that date, Doctor, he hadn't had any particular impairment of the use of that arm, had he except what he complained of subjectively?

A. Would you state that again, please, sir?

Q. I say on that date he never had any real impairment of the use of the arm except what he complained of subjectively, isn't that what you mean, sir?

A. That I can't answer for you. That is the first time I saw him. I accept his story that he had been unable to use the arm. While in the [19] office on the occasions that I had to watch him he obviously did not use it at that time as much as he did the left side.

Q. To what extent was he unable to use it from an objective standpoint, Doctor?

A. From an objective standpoint at that time I would say in the neighborhood of 40 per cent to 50 per cent disability.

Q. That is in the lifting processes only, isn't that correct?

A. Any type of work that would require the use of the upper arm, yes—lifting, pushing, pulling.

(Testimony of Hunter J. Mackay.)

Q. The use of his arm was not impaired for the purpose of turning valves on and off, was it—he could use his arm and hand for that purpose, could he not?

A. Well, of course, there are a lot of variables in a thing like that. It depends upon the size of the valves and so on.

Q. Say an ordinary valve, a 3-inch valve.

A. I am sorry; you are not speaking my language. I don't know what a 3-inch valve is.

Q. Well, the fact is, Doctor, when you say he had loss of use of the arm, it was only loss of use of the arm based entirely on his lifting processes—his use of the arm for lifting, isn't that correct?

A. Yes, heavy types of work.

Q. And that would be excessively heavy types of work, isn't that right, sir?

A. Well, it is a relative statement—yes.

Q. Well, could he carry a chair around?

A. Yes.

Q. Could he carry a 50-pound sack around?

A. With the use of his good extremity, yes.

Q. Well, I mean he would have to use both hands anyway, would he not? A. Yes.

Q. Could he handle tools?

A. Certain types of tools, yes.

Q. Well, what types of tools couldn't he handle?

A. He would find difficulty in using wrenches, for example.

Q. He couldn't handle those?

A. It would be difficult.

Q. Large, for instance, or small wrenches?

(Testimony of Hunter J. Mackay.)

A. Large ones.

Q. He could handle ordinary-sized wrenches, could he not? A. Yes.

Q. When you talk about large wrenches, you mean these [21] big long heavy Stilsson wrenches, is that right?

A. I was referring particularly to the types that pipefitters use and so on.

Q. I see. Doctor, there is a piece of shrapnel imbedded just below the right clavicle, is there not?

A. Yes.

Q. You don't believe that that should be taken out, do you, Doctor? A. No.

Q. You don't believe that its presence there in anyway incapacitates Mr. McNair?

A. No, that is right.

Q. In other words, the mere fact that there is a small piece of shrapnel doesn't hurt him at all, is that correct, sir? A. That is correct.

The Court: Where is that piece of shrapnel?

The Witness: It is just above the first rib on the right side.

The Court: Is it imbedded in the bone or is it floating around in the flesh?

The Witness: It is in the soft tissue [22] above the first rib.

Q. (By Mr. Pellegrini): There is no treatment indicated for removing it, is there, Doctor?

A. No, sir.

Q. It is not uncommon for persons to carry small foreign bodies, such as a piece of shrapnel, such as Mr. McNair has, is it?

(Testimony of Hunter J. Mackay.)

A. That is right.

Q. They are generally allowed, are they not, under good medical practice, to remain in the body at the point where they are? A. Yes.

Q. And you wouldn't want to remove this, would you? A. No, I wouldn't.

The Court: Above what rib is that shrapnel?

The Witness: The first rib, your Honor.

The Court: That is at the top.

The Witness: Yes, sir.

The Court: How would you go about removing this shrapnel, if you did; would you cut the clavicle away in order to do that?

The Witness: No, sir. Through a small incision above the clavicle.

The Court: Is there any question of the [23] clavicle having to come out if that piece of shrapnel was to be taken away surgically?

The Witness: No, sir.

The Court: There is nothing wrong with the right clavicle, then, is there?

The Witness: No, sir.

(X-ray marked as Respondent's Exhibit A-1 for identification.)

The Court: The right clavicle in its functioning is not interfered with by the presence of the shrapnel, is it?

The Witness: No, sir.

Q. (By Mr. Pellegrini): Doctor, I hand you Respondent's Exhibit A-1 which purports to be an X-ray taken of Mr. McNair at the Marine Hospital.

(Testimony of Hunter J. Mackay.)

Would you examine it and see if you can locate the piece of shrapnel which is shown in that X-ray?

A. Yes. It is visible here.

Q. Will you show it to the court?

A. This little triangular, irregular piece of shrapnel in this position here (indicating on X-ray).

Q. That piece of shrapnel imbedded where it is, in its [24] position in the soft tissues, does not in anywise impair Mr. McNair physically, does it, Doctor?

A. No.

Q. Would the fact that Mr. McNair was able to accept employment on board a vessel and actually work on the vessel indicate to you that he was able to perform duties at sea?

A. Not in itself. It indicates that he was willing to try to perform the duties.

Q. Well, if he did perform the duties, as a matter of fact, it would be some indication, would it not, Doctor, that he was able to follow his usual occupation as a seaman?

Mr. Geisness: I object to that question on the ground that it doesn't call for a medical opinion at all but for a layman's opinion.

The Court: The objection is overruled. If he knows the answer, he may give the answer.

(Last question repeated by the reporter.)

A. With a certain degree of reservation, yes. I don't feel I am in a position to answer that.

Q. (By Mr. Pellegrini): Doctor, you are generally [25] familiar with work around a garage, are you not?

A. In a vague way, yes.

(Testimony of **Hunter J. Mackay.**)

Q. And you feel that Mr. McNair's physical condition is such that he could perform that kind of labor?

A. I am not sure that I know just what you want me to—

Q. Well, if you can't answer the question, I don't want you to answer it.

A. I am not sufficiently familiar with the specific things that these fellows do in garages, I don't believe, to give you an intelligent answer to the question.

Q. You have some degree of knowledge as to the things that are done around a garage when a man works on a car, are you not?

A. Oh, yes, some of the lighter work. Handling a crankcase, of course, is another story.

Q. Do you believe Mr. McNair is able to do that kind of work?

A. In view of the complains that he has when he attempts to do that kind of work I don't think he is, no.

Q. In other words, a good deal of your opinion on August 15th, 1947 and at the present time is based entirely upon subjective complaints, is it not, [26] Doctor?

A. More so at the present time, of course, than in August.

Q. At the present time, all of it is based upon subjective complaint, is that correct, sir?

A. At the present time, yes.

(Testimony of Hunter J. Mackay.)

Q. And on August 15th, 1947 your findings were in a large part based upon subjective complaints, were they not?

A. Well, of course, findings are based upon subjective findings and that is what I had was the loss of reflexes and so on.

Q. Isn't it a fact that you arrived at your opinion based upon what McNair told you as to the pain that he had?

A. No. As I previously stated, in August of last year I thought there was sufficient objective evidence to indicate that he had a definite impairment. At the present time those signs have returned virtually to normally.

Mr. Pellegrini: That is all. [27]

Redirect Examination

By Mr. Geisness:

Q. Do you happen to remember now about how much the right triceps brachial reflex was diminished in August, 1947?

A. Somewhere between—the best I could estimate it—I think a 75 per cent to 80 per cent loss.

Q. How do you measure that?

A. We try to estimate the response of a reflex in terms of a grade of four—in other words, 25, 50, 75 per cent or 100 per cent loss or increase. It is probably accurate within five to ten per cent depending upon the examiner.

Q. Do you measure something that a man does of his own volition for you?

A. No. It is purely a reflex action when you tap the tendon with a hammer and your estimate

(Testimony of Hunter J. Mackay.)

comes from doing it enough years with enough different patients so that you eventually get the idea of about what normal is and what per cent of it is gone.

Q. I don't know what an estimate of the brachial reflex would be.

A. That is tapping a tendon in the back of the elbow, so that the arm will jerk in extensory fashion. [28]

Q. You have indicated that the brachial reflex would be that nerve group going down the arm, is that right?

A. Part of the ramification, yes.

Q. The brachial, I should say. And the right triceps would be a division of that, is that correct?

A. Yes, that is correct.

Q. What division would it be?

A. What we refer to as the posterior cord of the brachial plexus. It is branches from that division. The plexus itself divides into three major divisions.

Q. Where does it divide?

A. Up in the root of the neck, here.

Q. When you say the posterior cord, what do you mean?

A. That is the one towards the back, or in the post-dorsal position.

Q. In this case, would it be on the back of the arm?

A. Yes. It maintains its relations in approximately that fashion, down the arm.

(Testimony of Hunter J. Mackay.)

Q. So that it would really be a part of the brachial which goes down the back of the arm, to over-simplify it, is that correct?

A. Yes, that is right.

Mr. Geisness: I think that is all.

Mr. Pellegrini: No further questions. [29]

The Court: You may be excused.

(Witness excused.)

The Court: Call the next witness.

Does anyone offer this Respondent's Exhibit 1, while the doctor is here?

Mr. Geisness: I offer it. It might as well be admitted in evidence, I suppose, as long as it has been identified.

Mr. Pellegrini: I have no objection.

The Court: Admitted.

(Respondent's Exhibit A-1 received in evidence.)

BENJAMIN W. McNAIR,
the libelant, having been first duly sworn, was
examined and testified as follows:

Direct Examination

By Mr. Geisness:

Q. Will you state your full name, please? [30]

A. Benjamin W. McNair.

Q. Where do you live, Mr. McNair?

A. Redmond, Washington.

Q. How long has that been your home?

A. It has been about eleven years.

(Testimony of Benjamin W. McNair.)

Q. How old are you? A. Twenty-one.

Q. Back in December, 1944, were you going to sea? A. Yes, sir.

The Court: How old did you just say you were?

The Witness: Twenty-one, sir.

Q. (By Mr. Geisness): What ship were you on in December, 1944?

A. I was on the William S. Sharon.

Q. Is that a United States Merchant vessel?

A. Yes, sir.

Q. In what capacity were you employed aboard that ship? A. Fireman and water tender.

Q. When did you first become a member of the crew of that ship?

A. October—it was in October, sir. I don't remember the date.

Q. 1944? [31] A. Yes, sir.

Q. Where did you join the ship?

A. In Seattle.

Q. Where were you on December 28th, 1944?

A. In the Philippines.

The Court: December 28th, was it?

Mr. Geisness: Yes.

Mr. Pellegrini: This is all admitted in the Answer to the Libel, your Honor.

Q. (By Mr. Geisness): The Libel states that you and the ship were in Mindoro, Philippine Islands, is that correct? A. Yes, sir.

Q. What occurred on that day?

A. About 10:30 in the morning there were suicide planes came over and they dove into different ships, and dove into ours, too.

(Testimony of Benjamin W. McNair.)

Q. Were you injured? A. Yes, sir.

Q. What kind of an injury did you sustain?

A. Shrapnel injury.

Q. In what part of your body?

A. In my neck.

Q. Were you rendered unconscious by that injury? [32] A. Not right at the moment.

Q. What did you do; where did you go?

A. They had an Army doctor on the ship that didn't get injured and he took care of the wounded.

Q. I didn't hear?

A. There was an Army Sergeant they had for medical attendance, like first-aid, and he took care of the wounded.

Q. Did he take care of you? A. Yes, sir.

Q. On board the William Sharon?

A. Yes, sir. He gave just a first-aid treatment because we were taken off by the destroyer.

Q. How long after that did you leave the William Sharon?

A. Oh, in about ten or fifteen minutes we were put board a destroyer.

Q. Did you remain on board that ship or on that and other ships until your return to the United States or did you go ashore at some foreign place for treatment?

A. No, sir. We were treated on the destroyer and then we were treated in New Guinea. And then we were—or rather we were taken to Hatii on the Hughes. Then we transferred there to New Guinea and had checkups there and treatments and

(Testimony of Benjamin W. McNair.)

then were put [33] back on the Hughes and sent to the States.

Q. When did you arrive in the United States?

A. March 2nd, 1945.

Q. At what port? A. Frisco.

Q. During the interval between the time you were injured and March 2nd, when you got back to the United States, what kind of treatment did you get? A. Well, that is hard to say.

Q. Was your shoulder operated upon?

A. No, sir. Well, I couldn't answer that. I wouldn't know, really.

Q. You don't know really what they did?

A. No, I don't.

Q. What was the condition of your arm during that period?

A. During that period it was very numb.

Q. Were you able to manipulate it—to use it and handle objects? A. No, sir.

Q. Could you lift it? A. No, sir.

Q. What was its condition when you got back to San Francisco; was it any different than what you have just described, and if so in what way?

A. Yes, sir. I could move it by the time I got back to Frisco.

Q. Were you able to use it for such things as dressing yourself and handling your clothing?

A. I had trouble with it but I didn't use it.

Q. Did you stay in San Francisco or did you go from there to some other place immediately?

A. No, sir. I left San Francisco for Seattle.

(Testimony of Benjamin W. McNair.)

Q. After you got back to Seattle, did you obtain any medical attention of any description?

A. No, sir.

Q. Did you at any time after your return?

A. Yes, sir.

Q. When was that?

A. In the Marine Hospital. I don't remember the date.

Q. Could you tell us just about how long it was after you got back? The Marine Hospital abstract would indicate that you were furnished out-patient care at the Marine Hospital from April 9th, 1945 to May 22nd, 1945? Does that agree with your recollection?

A. What was that? Will you state that again, please?

Q. April 9th, 1945 through May 22nd, 1945?

A. It was somewhere in there all right.

Q. What was the occasion of your going to the Marine [35] Hospital?

A. Well, I was told by the doctor on the destroyer if my arm didn't get better when I returned to the States after awhile to report to the Marine Hospital where I was at or to the hospital and have it checked.

Q. How did it get along after you got back to the United States until you went to the Marine Hospital?

A. It didn't get along so good.

Q. What was the trouble?

A. I was having trouble,—well, using it in general.

(Testimony of Benjamin W. McNair.)

Q. What kind of trouble did you have?

A. Well, mostly in lifting or—well, it was just in general work that I had trouble with it.

The Court: During what period of time,— general work during what period of time—before what date?

The Witness: Well, I got back on March 2nd to Frisco and then I came up home. We were down there a couple of days, I guess, before we got everything straightened out and headed home. I never tried to use it much for awhile after that.

The Court: I don't know what you were doing and why you would be using it and what you [36] were using it for. You see, I don't know anything about what you were doing after you left San Francisco or before.

The Witness: We came up on the train from San Francisco to Seattle and I didn't do nothing at the present. I was at home with my father.

The Court: How long did you stay at your father's home in Redmond after your return?

The Witness: I stayed there until I went to the Marine Hospital.

The Court: When did you go to the Marine Hospital?

The Witness: Around April, I guess; it seems like that, sir.

Q. (By Mr. Giesness): Did you stay in the Marine Hospital or were you just treated as an outpatient? A. Just treated.

Q. During that time, where did you live?

(Testimony of Benjamin W. McNair.)

A. In Redmond.

Q. Were you still at your father's home?

A. Yes, sir.

Q. Had you tried to do any work between the time you got back to San Francisco and the time you went to the Marine Hospital? [37]

A. Yes, sir, I did.

Q. What kind of work did you attempt?

A. I attempted gardening and orchard work.

Q. For hire or for your parents?

A. For hire.

Q. For hire? A. Yes, sir.

Q. How did you get along with that work?

A. Well, it was just a little too much for my arm.

Q. Did that have anything to do with your going to the Marine Hospital? A. Yes, sir.

Q. When you say you had trouble with your arm, what trouble did you have; I mean by that did you have trouble with some sensation or pain or weakness, or just what was the trouble?

A. Well, I had trouble with the weakness of it. When I lifted very much I could feel it.

The Court: What arm are you talking about?

The Witness: My right arm, sir.

The Court: Every time you speak of your arm, do you wish the Court to understand that you are talking about your right arm, unless you specifically refer to your left one?

The Witness: Yes, sir. [38]

The Court: All right.

Q. (By Mr. Geisness): Are you right or left-handed? A. Right-handed.

(Testimony of Benjamin W. McNair.)

Q. What if any treatment was given you at the Marine Hospital here in Seattle?

A. Will you restate that, please?

Q. What if any treatment was given you at the Marine Hospital here in Seattle?

A. What if any treatment?

Q. What treatment was given you?

A. They made an incision,—as far as I know, they made an incision at the Marine Hospital.

Q. Where did they make that incision,—what part of your body?

A. They made it in my neck, in my right arm, the shoulder.

Q. Was anything else done?

A. Well, they took X-rays of my right arm and neck.

Q. During the time that you were getting out-patient care at the Marine Hospital, beginning in April, 1945, were you doing any work?

A. No, sir.

Q. After the end of that out-patient treatment at the [39] Marine Hospital, did you do any work?

A. After a while, yes, sir.

Q. About when did you first do any work thereafter?

A. Oh, it wasn't too long after that I went back to sailing,—August something.

Q. I have a discharge indicating that you shipped on the SS Toloa August 13th, 1945. Is that the job to which you refer?

A. Yes, sir.

Q. Had you gone to sea on any occasion before that and after you got back?

A. No, sir.

(Testimony of Benjamin W. McNair.)

Q. In what capacity did you serve on the Toloa? A. In the engine room.

Q. What was your job in the engine room?

A. Oiler.

Q. Was that a temporary or permanent job?

A. That was a permanent job.

Q. That was a what?

A. A permanent job on that ship.

Q. How long did you stay on the ship?

A. I stayed the full length of the trip.

Q. Did you make any other trips than that trip?

A. No.

Q. Why not? [40]

A. No, sir. I don't believe I did.

Q. And why didn't you?

A. Well, I had a lot of heavy work to do and it was too much for me, so I changed and got off that ship.

Q. What kind of heavy work do you have to do as an oiler?

A. You are required to help the engineers in repairing condensers and cleaning condensers, working on heavy boiler plates, working on bluing the bearings and heavy parts on reciprocating engines; several kinds of heavy work like that.

Q. After you left the Toloa, which your discharge indicates was September 14th, 1945,—is that about the right date? A. Yes, sir.

Q. After you left the Toloa on that date, when did you next work?

A. It was awhile after that, I took another ship and sailed to Alaska again.

(Testimony of Benjamin W. McNair.)

The Court: Did you sign on that ship as a seaman after you were hurt with this shrapnel in Manila in 1944?

The Witness: Yes, sir.

The Court: What date did you sign on? [41]

The Witness: August 13th, 1945. Is that correct?

Mr. Geisness: That is what the discharge shows.

The Court: That Toloa was engaged in Alaska trade, was it?

The Witness: Yes, sir.

The Court: You may proceed.

Q. (By Mr. Geisness): Do you know about when it was that you took that next ship?

A. No, I don't.

Q. How long after you left the Toloa was it?

A. I guess it was about a month afterwards.

Q. In what capacity did you serve on the next ship?

A. I served up in the dining room, being a waiter on tables.

The Court: What ship was that?

The Witness: That was the Barranoff.

Q. (By Mr. Geisness): How long did you work on that ship?

A. I worked one trip. It was around twenty-seven days or something near that,—one trip to Alaska.

Q. Did you have any trouble with doing your work on [42] that ship?

A. Well, as long as it consisted of carrying heavy trays I had a little trouble.

Q. What kind of trouble did you have?

(Testimony of Benjamin W. McNair.)

A. Just a weakness in my right arm.

The Court: How long did you serve on the Barranoff?

The Witness: About 27 or 28 days, sir.

Q. (By Mr. Geisness): Since you left the Barranoff, have you ever again gone to sea?

A. No, sir.

Q. Why is that?

A. Well, sir, I tried it that last time and I just decided to give it up.

Q. Why did you decide to give it up?

A. Because I couldn't stand my own job in the engine room, because I belonged to the black gang in the first place and that Barranoff job was a temporary job.

Q. Did you have the proper papers to continue the job like you had on the Barranoff?

A. No, sir.

Q. Why couldn't you go back on the black gang and do black-gang work? [43]

A. Like I told you, it was just too much heavy work.

Q. Since you left the Barranoff, what kind of work have you done?

A. I have helped my father and my brother around home and with mechanical work.

Q. When did you first start doing that after you left the Barranoff?

A. It was a month or so afterwards, somewhere around in there.

Q. Do you work regularly at the jobs you have just mentioned, helping your brother and your

(Testimony of Benjamin W. McNair.)

A. No, sir; just when they have work to do, then I help them.

Q. Have you done any other kind of work since you left the Barranoff? A. Yes, sir.

Q. What have you done?

A. I tried apple picking.

Q. Where?

A. Over in the Valley at Brewster.

Q. Over in Eastern Washington?

A. Yes, sir.

Q. When did you do that?

A. Oh, that was in September of last year; somewhere in [44] there,—August or September.

Q. September, 1947? A. Yes, sir.

Q. How long did you work there?

A. My brother and I, I think, worked there a week or two weeks.

Q. How did you get along at that work?

A. Oh, you have to carry a heavy sack around your neck and I didn't get along so good with it.

Q. Did you leave before the job was finished or did you finish the job and then come home?

A. We left before the orchards were finished.

Q. You say "we left." Your brother, you say, went with you?

A. Yes. He came back with me.

Q. You both left, did you? A. Yes, sir.

Q. Were you able to continue with the work?

A. Well, it gave me quite a bit of trouble and I just didn't care to keep being bothered by it.

(Testimony of Benjamin W. McNair.)

Q. Since you left the Barranoff, have you done any work except those you have mentioned, helping your brother and your father in their work and picking apples in Brewster? A. No, sir. [45]

Q. Do your brother and father pay you for the work you do for them?

A. Well, I stay at my father's house, sir.

The Court: Yes. But do they pay you; do you get any money for the work you do or is that allowed on your board, your expense and keep?

The Witness: That is allowed on my expense and keep, sir.

Q. (By Mr. Geisness): What have you done for money other than the work you have done for your board and room at home?

A. What have I done besides those two jobs?

Q. Yes; what else have you done that you get money for? A. Nothing. That is all.

Q. What is your condition right now?

A. Well, it is better than it was before.

Q. Do you have any trouble with your arm?

A. Yes; I have a weakness in lifting of my right arm.

Q. Are you able to return to your engine room work now?

A. I wouldn't know, because I haven't tried it.

Q. Judging from your experience at Brewster when you were picking apples last September, would you say that you were at that time able to return to your engine room work on board ships?

(Testimony of Benjamin W. McNair.)

A. I couldn't tell you because I wouldn't know without trying it. If I had tried it, I could very definitely have stated whether I could have or whether I couldn't have.

Q. After your return from the Sharon, were you called up for military service?

A. Yes, sir.

Q. About when was that, do you remember?

A. It was just shortly after I was home. I don't remember the exact date.

Q. Were you accepted or rejected?

Mr. Pellegrini: If the Court pleases, the record would be the best evidence of that.

The Court: Counsel has a right to ask him if he knows.

Mr. Geisness: May I have the document marked?

(Certificate of Fitness marked as Libelant's Exhibit 1 for identification.)

Q. (By Mr. Geisness): You are being handed what has been marked as Libelant's Exhibit 1 for identification. Are you the Benjamin W. McNair named in that paper? A. Yes, sir.

Mr. Geisness: We offer Libelant's Exhibit 1 [47] in evidence, if the Court please.

Mr Pellegrini: Objected to, if the Court please, as immaterial.

The Court: I think you ought to prove its materiality,—if that is not admitted, and apparently it is not, in view of the objection stated.

Mr. Pellegrini: It is not properly identified.

(Testimony of Benjamin W. McNair.)

If there are certain matters appearing in the document about which the libelant wishes to have testimony, the document itself—if it were admitted—would deprive the respondent of the right to cross-examine. I am objecting to it on all of those grounds.

The Court: You may inquire concerning its proper identification and authentication as an admissible document.

Q. (By Mr. Geisness): Where did you obtain that document, marked Exhibit 1?

A. From Seattle, from the Army, where they give you a physical checkup.

Q. Had you been given a physical examination by the Army before you received that document?

A. Yes, sir. [48]

Q. And before you received that document had you been notified to report for Military Service?

A. Yes, sir.

Mr. Geisness: It seems to me, Your Honor, that the document now shows rejection for one employment and that was Service in the Military Forces and a rejection on the grounds of physical unfitness.

The Court: Well, I don't know whether it does or not.

Mr. Pellegrini: Physical unfitness may be due to syphilis; I don't know.

Mr. Geisness: It has to be taken into consideration with all of the other evidence.

Mr. Pellegrini: It deprives us of the right to cross-examine the offer of the document.

(Testimony of Benjamin W. McNair.)

The Court: Would your objection be the same if it had been issued by the Marine Hospital concerning his ability to continue his work as a seaman?

Mr. Pellegrini: As related to this particular injury?

The Court: Yes.

Suppose after this examination and after the operation, the Marine Hospital had issued a certificate [49] similar in character to this.

Mr. Pellegrini: Stating that he was rejected because of physical disability due to the shrapnel? I would have no objection in that case.

I don't know whether this certificate is based upon the fact that he had been wounded at Mindoro or not. I wouldn't have any way of knowing.

The Court: The objection is sustained.

Mr. Pellegrini: I don't know what the reason for it is and have no way of knowing.

Q. (By Mr. Geisness): At the time you received Libelant's Exhibit 1, did you have physical impairment of any kind other than the injury sustained in the Philippine Islands on December 28th, 1944?

A. No, sir. That was the idea. They told me in there that that was the reason I was being rejected.

Mr. Pellegrini: Objected to.

The Court: You can't state what was said in there. The rules of evidence prevent you from doing it and those rules apply to every kind of a case.

(Testimony of Benjamin W. McNair.)

Mr. Geisness: We renew the offer of Libelant's [50] Exhibit 1 on the ground that under the proof now there was no physical impairment except the condition resulting from the injury in the Philippines. Of course, as a matter of proof, Respondent might prove anything else as to his physical condition.

The Court: The exhibit itself confines the duration of the period of certification, does it not?

Mr. Geisness: Yes.

Mr. Pellegrini: It is not a certified copy. I won't object to it on that ground.

Mr. Geisness: I understood Your Honor's inquiry was whether it confined the period?

The Court: That is correct. My question was whether it tends to limit the life of the certificate.

Mr. Pellegrini: It is limited to six months.

Mr. Geisness: It declares for a period of six months.

The Court: The objection is overruled as to this exhibit under the testimony.

This exhibit is now admitted.

Mr. Pellegrini: Exception, Your Honor.

The Court: Allowed. [51]

(Libelant's Exhibit 1 received in evidence.)

(Testimony of Benjamin W. McNair.)

LIBELANT'S EXHIBIT NO. 1

Selective Service System

CERTIFICATE OF FITNESS

[Stamp] (Local Board No. 2, King County, June 5, 1945, Kirkland, Washington.)

Benjamin Willy McNair. Order Number 12250-A.

Having been forwarded for preinduction physical examination and having been examined, I hereby certify that you have been found:

1. [] Physically fit, acceptable for general military service.
2. [] Physically fit, acceptable for limited military service.
3. xxxxxx
4. [x] Rejected, physically unfit. Temporarily—
Re-examine in 6 mos.
5. [] Rejected, physically fit but unacceptable for other reasons.

Date of examination: 5 June, 1945.

C. L. BARRETT, Capt., AGD

Induction Station Commander

/s/ C. L. BARRETT, Capt., AGD

OIC Armed Forces Trav. Board,
Seattle, Wash.

Mr. Geisness: I think that is all of the questions that I have, if the Court please.

The Court: I will say this: The Court received that in veidence and will consider it only as a circumstance indicating that he was rejected as physically unfit for the Army. The Court will not con-

(Testimony of Benjamin W. McNair.)

sider it as evidence that he was unfit for anything else.

That is a circumstance that may have some bearing on whether or not he was physically disabled. It is circumstantial evidence,—not direct evidence of it. That is what I mean to say.

(Letter dated 10/9/46 marked Respondent's Exhibit A-2 for identification.)

(Letter dated 2/10/47 marked Respondent's Exhibit A-3 for identification.) [52]

Cross Examination

By Mr. Pellegrini:

Q. Mr. McNair, you were injured September 28th, 1944, were you not? A. Yes, sir.

Q. How long after your injury was it before you could move your arm?

A. I could not distinctly date the weeks or days it was.

Q. I mean approximately, sir; I realize that.

A. Within a few weeks.

Q. As a matter of fact, you could move your fingers and arm within three weeks after the injury, is that correct, sir?

A. Around somewhere in there.

Q. So that at the end of three weeks you were able to move your arm and use all of your fingers, is that correct? A. In about that time.

Q. Of course, your arm was weak naturally, was it not? A. Yes.

Q. And you were able to dress yourself within three weeks, were you not?

(Testimony of Benjamin W. McNair.)

A. I didn't use that arm to dress myself within that time. [53]

Q. When did you first start dressing yourself?

A. Just shortly before I arrived in Frisco.

Q. And you arrived in Frisco when?

A. March 2nd.

Q. 1945? A. '45.

Q. And at the time you arrived in San Francisco on March 2nd, 1945, did you report the fact of your injury to the Maritime Commission or to the United Fruit Company who were operating the vessel?

A. It was reported to the United Fruit Company.

Q. Who did you report to at the United Fruit Company?

A. I did not report it. It was reported by the officials on the ship.

Q. You, yourself, did not report to them, did you? A. No, sir.

Q. You did not report, yourself, that you were incapacitated,—that you were disabled?

A. That is better. I understand that. No, I didn't, sir.

Q. You never made any report of any disability to the Maritime Commission or to the United Fruit Company until some time in 1946, isn't that right, when you filed a claim with the Maritime Commission?

A. I don't know exactly the date on that, when I filed [54] the claim.

Q. Didn't you send the claim in, in October,

(Testimony of Benjamin W. McNair.)

1946, or your attorneys send the claim in for you on that date? A. Just about that date.

Q. I will hand you what has been marked for identification Respondent's Exhibit A-2 and ask you if that is the claim signed by you attached to that exhibit? A. Yes, sir, this is.

Q. And that was forwarded by a letter of your attorneys, was it not, under date of October 16th, I believe, 1946?

A. I couldn't state the date.

Q. Would you examine the first document and answer if that is the right date?

A. October 9th, 1946.

Q. So that until that time no report or any claim was ever made, is that right, sir, by you?

The Court: By you personally as distinguished from some other. A. No, sir.

Q. (By Mr. Pellegrini) When did you make a claim, sir?

A. I didn't make any claim, sir. [55]

Q. That is the first notice of any claim disability, is it not? A. That is right.

Q. However, you went to the Marine Hospital in 1945, is that correct?

A. Somewhere in there.

Q. What month?

A. It was in April somewhere, I suppose. I don't remember the exact date.

Q. It was April 9th, 1945,—would that be the correct date? A. Around there, yes, sir.

Q. And you received out-patient treatment while you were up there, did you not? A. Yes.

(Testimony of Benjamin W. McNair.)

Q. Following that out-patient treatment, you were found fit for duty at sea, were you not?

A. I couldn't answer that question.

Q. I will hand you what has been marked Defendant's Exhibit A-3 for identification and ask if the abstract of your clinical record is not attached to that exhibit?

A. If you would restate the question, please?

Q. Isn't that an abstract of your clinical record at the Marine Hospital during the period April 9, 1945 [56] to May of 1945?

A. I couldn't say the statement was unless I knew it came from there, sir.

Q. Doesn't it purport to come from there?

A. That is what it looks like.

Q. And it is referred to in the letter signed by your attorneys, addressed to the Maritime Commission, is it not?

A. Yes, sir.

Q. You recognize the signature of your attorneys on the first document of that exhibit, do you not, sir?

A. Yes, sir.

Q. And that clinical record or abstract of record is referred to in that letter, is it not?

A. Yes, sir. I believe it is.

Q. As being your clinical record or an abstract of your clinical record, isn't that right, sir?

A. Yes, sir.

Mr. Pellegrini: I offer Respondent's Exhibit A-2 and Respondent's Exhibit A-3 in evidence, if the Court pleases.

Mr. Geisness: No objection.

The Court: Each of them is now admitted. [57]

(Testimony of Benjamin W. McNair.)

RESPONDENT'S EXHIBIT A-2

Bassett & Geisness
Attorneys at Law
811 Alaska Building
Seattle 4

October 9, 1946

War Shipping Administration
Division of Wartime Insurance
99 John Street

New York, New York

Attention: Mr Cantwell

Gentlemen:

We enclose a claim under the Second Seamen's War Risk Policy, and will appreciate it if you will send communications respecting this claim to us.

Yours very truly,

JG:b

/s/ JOHN GEISNESS.

[Barrett & Geisness Letterhead]

September 6, 1946

War Shipping Administration
Division of Wartime Insurance
99 John Street

New York, New York

Attention: Mr. Cantwell.

Re: Benjamin W. McNair

SS "William Sharon"

Gentlemen:

On December 28, 1944, I was employed as a member of the crew of the SS "William Sharon", being operated for the United States of America

(Testimony of Benjamin W. McNair.)

through the War Shipping Administration. On said date while said vessel was at Mindoro, P. I., I sustained shrapnel wounds in the right side of my neck when said vessel was struck by bombs dropped from enemy aircraft. As a result of said wounds I was totally disabled until August 13, 1945, and have been permanently disabled to a very substantial degree.

By reason of the foregoing, claim is made under the Second Seamen's War Risk Policy.

My home address is Box 673, Redmond, Washington. I was born

Yours very truly,

/s/ BENJAMIN W. McNAIR.

RESPONDENT'S EXHIBIT A-3

[Bassett & Geisness Letterhead]

February 10, 1947

Mr. W. H. Cantwell, Chief Adjuster

Division of Insurance

U. S. Maritime Commission

45 Broadway

New York 6, New York.

Re: Benjamin McNair

SS William Sharon

Dear Sir:

This letter is in response to yours of October 23, 1946 in which you request certain information concerning Mr. McNair.

After his repatriation March 2, 1945, Mr. McNair, on April 9, 1945, reported to the Marine Hos-

(Testimony of Benjamin W. McNair.)

pital in Seattle. We enclose an abstract of the hospital's clinical record indicating that Mr. McNair was an out-patient until May 22, 1945, and that the hospital found a foreign body overlying the right clavicle and right first rib but considered him fit for work without removal of the body. McNair was unable to work and stayed at the home of his parents in Redmond, Washington until about the 13th of August, 1945 when he became a member of the crew of the SS "Toloa" in Seattle.

McNair was rejected as physically unfit by Local Board No. 2, Kirkland, Washington, June 5, 1945 with a direction that he be re-examined in 6 months. The doctors at the Marine Hospital recommended against removal of the shrapnel and it has never been removed.

Yours very truly,

/s/ JOHN GEISNESS.

[Printer's Note]: Abstract of Clinical Report attached is read into evidence, below.

(Respondent's Exhibit A-2 received in evidence.)

(Respondent's Exhibit A-3 received in evidence.)

Mr. Pellegrini: I would like at this time to read the Abstract of the Clinical Record, which is part of Respondent's Exhibit A-3.

The Court: You may do that.

Mr. Pellegrini (Reading):

(Testimony of Benjamin W. McNair.)

“ABSTRACT FROM CLINICAL RECORD

“May 25, 1945

“Name: McNair, Benjamin W.

“Occupation: M. S.

“Age: 18 years.

“Last Vessel.: S.S. William Sharon.

“Furnished hospital care from....., 19.....,
to....., 19.

“Furnished outpatient care from April 9, 1945,
to May 22, 1945.

“Diagnosis: Foreign body overlying right clavicle and right first rib.

“Condition of Patient Upon Admission

“Patient complained that he had shrapnel in his neck. Examination shows a small pea size scar on right lower side of neck through which a blackened pinhead size spot can be seen. An incision and exploration down to external fascia revealed no evidence of shrapnel. X-ray of right side of the neck showed a small dense triangular shaped foreign body overlying the right clavicle and the right first rib where they cross. No other foreign bodies are evident.

“Patient complained he cannot lift anything without arm giving out or cramping. He was referred to our surgical service where he was examined with the following report:

“ ‘Small scar right supra clavicular region. Motions of shoulder, arm, elbow and hand normal. No signs of fracture. There is a foreign

(Testimony of Benjamin W. McNair.)

body near the right clavicle. In my opinion he is physically fit for duty.'

"Condition of patient on.....

"5-22-45—Fit for duty.

/s/ PAUL D. MOSSMAN

Medical Director—United States
Public Health Service, in Charge."

US Marine Hospital (Station) Seattle, Washington, AM.

(U. S. Public Health Service Seal) [59]

The Court: Will the remainder of your cross-examination be extensive, Mr. Pellegrini?

Mr. Pellegrini: I don't believe so, Your Honor, I would like to call Dr. Wagner this evening. He is a surgeon and must operate tomorrow.

The Court: Step down from the stand temporarily.

(Witness temporarily excused.)

The Court: You will have to call the doctor now if you are going to examine him.

Mr. Pellegrini: Dr. Jacob C. Wagner.

JACOB C. WAGNER,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pellegrini:

Q. State your name, please, doctor.

A. Dr. Jacob C. Wagner. [60]

Q. What is your occupation, sir?

A. I am Resident in Surgery at the United States Marine Hospital.

(Testimony of Jacob C. Wagner.)

Q. How long have you been a surgeon?

A. I have had surgical experience for a total of about three and a half years.

Q. To what extent?

A. Oh, general surgical work and working as Assistant with specialists in the various branches of surgery.

Q. In what service?

A. Public Health Service.

Q. Has all of your experience been in the Public Health Service, Doctor? A. Yes, sir.

Q. From what school did you graduate?

A. University of Nebraska.

Q. When? A. 1942.

Q. Since graduating from the University of Nebraska, you have been in the Public Health Service all of the time, is that correct?

A. Yes, sir. I interned in San Francisco with the Public Health Service.

Q. You have been attached to what particular hospitals?

A. I have been in the National Institute of Health for [61] one year doing research. I have been at the Marine Hospital in Louisville, Kentucky for about a year and four months doing general surgery; and another five months at Memphis, Tennessee doing general surgery. I have had about twelve,—about eleven months duty overseas and then returned to Federal Prison assignment in Springfield, Missouri for four months.

I was then assigned to the Seattle Marine Hospital.

(Testimony of Jacob C. Wagner.)

Q. What type of work have you specialized in during your service?

A. Most of it has been surgery.

Q. Are you presently engaged in surgical work at the Marine Hospital? A. Yes.

Q. Did you have occasion to examine Benjamin McNair? A. Yes.

Q. When?

A. I examined him Saturday morning; I don't know what that date was.

Q. At the Marine Hospital?

A. At the Marine Hospital.

Q. Prior to examining him, did you review the record at the Marine Hospital? [62]

A. Yes, sir.

Q. Do you have those records with you, sir?

A. Yes, sir. I had them on the desk there.

(Hospital Records marked Respondent's Exhibit A-4 for identification.)

Q. Those are the records at the Marine Hospital relating to Benjamin McNair, are they not?

A. Yes, sir.

Q. And those records are kept in the regular and usual course of the business at the hospital, are they? A. Yes, sir.

Q. And are required to be kept?

A. They must be returned and kept there.

Mr. Pellegrini: I offer them in evidence.

Mr. Geisness: I don't have any objection to this exhibit, so far as it pertains to the examination made by the doctor and the entries made by him.

(Testimony of Jacob C. Wagner.)

There are some entries made back in 1945 by another doctor—unidentified—so that I can't tell who he is. I do object to those entries.

The Court: The questions asked have a tendency to qualify those letters. I will permit counsel for the government to ask further questions concerning those parts of the records [63] in this exhibit not made by this witness.

Q. (By Mr. Pellegrini): Doctor, as to those portions of that exhibit which consist of documents and entries in documents made by other doctors, I will ask you whether or not under the rules and regulations of the Public Health Service you are required to make such entries,—each doctor?

A. Yes, we are. We have to keep records of each patient.

Q. Do you have to keep an accurate record of each visit and make entries?

A. That is right.

Mr. Geisness: I think I can withdraw my objection and I will do so now. It is extending the examination unnecessarily.

The Court: This Respondent's Exhibit is now admitted.

(Respondent's Exhibit A-4 received in evidence.)

Q. (By Mr. Pellegrini): When you examined Mr. McNair on Saturday, did you take a history from him? A. Yes, I did.

Q. Will you tell the court what Mr. McNair told you?

(Testimony of Jacob C. Wagner.)

A. Under "history" I have " I was hit by a shrapnel [64] December 28th, 1944 in Mendoro by a suicide plane attack. I had no trouble with the arm up to that time. I bled considerably at the time and was treated on board a destroyer that picked me up twenty minutes after the hit."

And then in the past tense:

"He was all numb down the arm and into the chest. He was unable to move his arm. He tried to move it and couldn't. It was in the second week before he could move his arm. He could move his fingers in the third week. He did not try to eat or hold things in his arm until March, 1945. At the present time he has no pain. He feels his right arm in general is not as sensitive as the left but there is no definite numbness. In ordinary use, eating and so on, there is no trouble. If he writes too long"

—I asked him how and he said about one or two hours—

"he gets cramps in his fingers. On lifting weights he develops a diffuse dull pain in the right side of his neck. His arm plays out or gets tired fast and he can't hold onto anything."

That is all under "history." [65]

Q. (By Mr. Pellegrini): Following that history, Doctor, you made a physical examination?

A. Yes.

Q. Just tell the Court what you found as a result of your physical examination and the extent of your examination.

(Testimony of Jacob C. Wagner.)

A. I examined the patient as to his general appearance and condition. He appeared to be in good health,—well nourished. I gave him a dynamometer test to check his grip. “In his right hand he recorded fifty-five pounds of pressure and in the left hand eighty-five pounds. The motion at the shoulder, elbow, wrist and all of the fingers was all in the full range of normal motion. There was no evidence of intrinsic muscular wasting, no atrophy, and there was normal ulnar, radial, and medial nerve function.”

Those are the three nerves of the arm.

“The circumference measurements of the arm and the forearm, right—28 centimeters, left—26.5. The forearm was right—26.5 centimeters and the left 26.0 centimeters. There is no evidence of a horner syndrome.”

Q. A what, doctor? A. Horner syndrome.

Q. Syndrone? [66] A. Syndrone.

Q. What is that, sir?

A. That is evidence of involvement of the sympathetic nerves to the head. It is a chain of nerves which arise in the cheek and run up the side of the neck and control the pupil and the sweat glands and so on of the head and neck. It is the involuntary nervous system.

Reflexes, I have got “Symetrically hypoactive, byceps and triceps and radi-ulnar.

Q. What do you mean by that, sir?

A. The reflexes are tendon jerks,—involuntary jerks of the tendons to the sudden impact of a percussion hammer.

(Testimony of Jacob C. Wagner.)

Q. What do they indicate?

A. They indicate that the sensory nerves to the muscle endings,—that is, the sensory fibers in the muscle which give their tone—and the reflex through the spinal cord and the motor nerve back to the muscle are all intact.

Q. Operating properly?

A. Operating properly.

Q. Did you find any symptoms of muscle impairment in the right arm of either the forearm or the upper arm? [67]

A. I could find no direct evidence except the dynamometer testing which suggested that the right grip was somewhat weaker than the left.

Q. Did you find anything other than that wrong with the upper or the lower part of the right arm?

A. No, sir.

Q. Doctor, what tests did you perform to determine whether or not there was any nerve damage?

A. Well, the usual tests are sensory to see if there is any loss of sensation of the skin anywhere in the arm and shoulder. I tried that on the patient. I have drawn pictures of the purported numbness. It doesn't fit any definite nerve pattern. And it fits in generally with the patient's statement that there is some diffuse numbness of the arm which he certainly can't limit as to definite location, and has no definite relationship to the injury of the neck that I could see.

Q. In other words, he reacted normally as far as sensory tests were concerned?

(Testimony of Jacob C. Wagner.)

A. He stated that he felt numb in different parts of the arm. But the distribution of the numbness did not fit any nerve pattern as ordinary tests found on testing specific nerve injuries.

Q. What other tests did you perform with regard to [68] possible nerve injury?

A. The reflexes as stated. And evidence that there is injury to the nerves and to the muscle in the form of atrophy of the muscle. There was no atrophy.

Q. Doctor, did you find any objective symptoms whatever of any impairment of the use of the libellant's right arm,—that is on the day of your examination last Saturday, which was the 17th of April of this year?

A. I could not be certain that there is any evidence of any definite injury to the arm, from my examination.

Q. Did you find any?

A. The dynamometer testing has been referred to,—weakness. I did two tests which are quite new and I don't,—the exact importance of them is not well established, and I don't think they would be suitable evidence for a court.

Q. Well, what were those tests?

A. They were oscillometrick readings in which a cuff is applied to the arm and a small needle, with the cuff inflated and under pressue, with each pulsation of blood into the arm there is a variation, measured by the flick of a needle in the instrument. The degree of flick of the needle indicates a

(Testimony of Jacob C. Wagner.)

stronger or weaker thrust on the cuff on the arm. And the greater [69] the flick, the greater the change of volume with each pulsation. In general, there was a slightly less oscillation of the needle on the right forearm as compared to the left. There is no difference shown in the upper arm. I also measured the temperatures at various points on both of the arms and shoulders, and found the temperature to be slightly lower in the various points,—the shoulder, the elbow, wrist, thumb, index finger, and little finger,—to be slightly lower than that of the left arm, which would indicate a slight degree of impairment of the blood flow to that arm.

Q. Doctor, based upon your objective findings, can you state whether or not in your opinion Mr. McNair would be able to follow his occupation as a merchant seaman?

A. On the basis of objective findings?

Q. Yes, sir.

A. No, there is no evidence that he couldn't follow them.

Q. In other words, in your opinion, he could follow them?

A. Based upon objective findings.

Q. You had some subjective complaints, did you not?

A. Yes, the patient's statements.

Q. And those statements were that he had a weakness or a numbness?

A. As he gave them to me, a kind of a diffuse dull pain in the shoulder, with the arm getting tired easily and giving out.

(Testimony of Jacob C. Wagner.)

Mr. Pellegrini: Considering the circumstances, I will rest as far as this witness is concerned.

Cross-Examination

By Mr. Geisness:

Q. What does anesthesia that doesn't follow any particular nerve pattern indicate?

A. I don't know, sir.

Q. Isn't that sometimes found in the case of a functional disorder?

A. Yes. It frequently is functional.

Q. If you are convinced that a person is honestly experiencing a disability or a feeling of disability, and then shows an anesthesia that doesn't follow any particular pattern, don't you consider the anesthesia to be significant as indicating a functional disorder? [71]

A. Not necessarily, sir. Usually you have a definite pattern with those; and this does not fit the usual functional pattern.

Q. Would an impairment of the brachial plexus have any possible effect upon the blood supply to the right arm? A. Yes, it could.

Q. How does that happen?

A. By reflex irritation of the basal motor nerves to the blood vessels of the arm.

Q. That nerve, then, activates the muscles that cause the blood to pass through the arm, is that right? A. It controls the blood vessels.

Q. The controls the blood vessels?

A. Yes.

(Testimony of Jacob C. Wagner.)

Q. Does that record you have—I am sorry I can't identify it by number—I think it is Respondent's Exhibit A-4. A. A-4.

Q. Does that indicate what the reflexes were in April and May, 1945?

A. No, there is no record that I have seen here.

Q. Does it indicate what if any loss of strength there was in the hand or arm at that time?

A. No, there is no recording of the strength.

Q. Does it indicate whether or not there was any atrophy at that time?

A. It was not recorded if it was examined.

Q. You never saw the man before last Saturday? A. No, I didn't.

Mr. Geisness: I think that is all I have.

Mr. Pellegrini: I have no further questions.

The Court: Mr. Pellegrini, does it occur to you that there is any question that you have overlooked which is material?

Mr. Pellegrini: No further questions.

Mr. Geisness: No further questions.

The Court: You are excused, Doctor.

(Witness excused.)

The Court: Court is adjourned until tomorrow morning at 10:00 o'clock.

(At 5:03 p.m., Tuesday, April 20th, 1948, proceedings adjourned until April 21st, 1948 at 10:00 o'clock a.m., in the United States Court House.) [73]

Seattle, Washington

April 21st, 1948, 10:00 o'clock, a.m.

(All parties present as before.)

The Court: Come forward and resume the stand.

BENJAMIN W. McNAIR,
previously sworn, resumed the stand and testified
further as follows:

Cross-Examination—(Continuing)

By Mr. Pellegrini:

Q. Mr. McNair, following your examination in May in the Marine Hospital, when you were discharged from the hospital, you thereafter sailed again, didn't you?

A. Yes; a short while after that I believe. [74]

Q. How many trips did you make on the Toloa? Toloa?

A. I made that one and then I think I made one more. I am not positive.

Q. Well, as a matter of fact, you made two more, didn't you, sir?

A. Well, I made one. There was a short trip and then they had two that went together.

Q. Well, you were on the Toloa for the trip from August 13th, 1945 to November 3rd, 1945, isn't that correct?

A. I think it is pretty close, yes.

Q. And then you signed on again on November 9th, 1945, is that right?

A. Yes, I think so.

(Testimony of Benjamin W. McNair.)

Q. Just a few days after the other trip ended. And that trip last until December 24th, 1945, is that right, sir? A. I think that is correct.

Q. And then you signed on again January 1, 1946, and you sailed on February 28th, 1946, did you not? That was the third trip?

A. Yes. There were two connecting trips there. There were two short ones.

Q. So that after the first trip which you testified to on cross-examination you sailed on two other trips? [75] A. Yes.

Q. And the days that I have given you,—the last date ending in February, 1946—are approximately correct, are they not, sir?

A. Approximately, yes.

Q. In what capacity did you sail?

A. To start with I sailed as an oiler on that ship, sir.

Q. On the second trip what were you?

A. The second or third trip I was working as a junior engineer. That was the second trip, I think,—as an engineer.

Q. On the third trip what did you sail as?

A. I had the same post.

Q. As a junior engineer?

A. Well, as an engineer. I don't know what they stated. That was just a promotion.

Q. I see. Following that you stayed ashore for approximately two months and you sailed on the Barranoff then, didn't you?

A. Yes. That was my last trip. That was just a temporary—

(Testimony of Benjamin W. McNair.)

Q. And you sailed on the Baranoff on May 8th, 1946, and got off here on May 23rd, 1946, is that right? A. I think that is correct.

Q. During these voyages that you went to sea on the [76] Toloa and the Barranoff, your services were satisfactory all of the time, were they not, sir,—in other words, you got satisfactory discharges, did you not?

A. Oh, yes; I believe I did.

Q. There was no complaint by any of your superior officers that you didn't do the work you were supposed to do, isn't that right?

A. Well, I couldn't tell you that. I couldn't vouch for them.

Q. Well, the fact is they gave you satisfactory discharges?

A. The discharges, yes,—they were put out by the Captain. They weren't put out by the officers.

The Court: Repeat in this connection the name of the last vessel that you worked on prior to the Barranoff.

The Witness: Toloa.

Q. (By Mr. Pellegrini): While you were working on these vessels, did you work any cargo while the ships were in Alaska?

A. I checked down in the cargo hold.

Q. You checked on it? A. Yes. [77]

Q. And assisted sometimes in the course of your checking in handling the cargo, did you not?

A. Not very often. You see, all we had to do was handle the cargo.

(Testimony of Benjamin W. McNair.)

Q. I understand. But occasionally you would have to assist in the course of your checking work, would you not—move crates around and do things of that nature in order to determine whether you had the right item that you were checking.

A. No. You see, deckhands do all of that.

Q. I think you testified that you picked apples for two weeks? A. Yes, approximately that.

Q. And that was over at Eastern Washington?

A. Yes, sir.

Q. You and your brother together?

A. Yes, sir.

Q. Your brother didn't like it, so you left, is that it? A. No, sir.

Q. What was it?

A. It was on account of that I couldn't keep up with the work.

Q. You couldn't keep up with the work?

A. No, sir. [78]

Q. You mean reaching overhead all of the time?

A. When you get a sack around your neck with a load of apples, there is quite a bit of weight in it.

Q. Since that time you have been working in a garage, have you not? A. Not a garage.

Q. What is it?

A. It is just that my dad gets a car once in a while to work on. He doesn't own a garage.

Q. Well, he does mechanical work at your home?

A. Now and then when a car comes in.

Q. You assist your father in that work?

A. My father and brother, yes.

(Testimony of Benjamin W. McNair.)

Q. They work at it regularly?

A. Just when they get a car, like I told you, sir.

Q. When they get them, you work around—

A. I help them.

Q. You help them? A. Yes.

Q. You have been working quite regularly at it, have you not?

A. No,—just helping now and then, when they get one.

Q. Every time they get one and there is work to do, you work on it, is that right?

A. Yes, if he needed the help. [79]

Q. That is regular garage work,—by that I mean it is the same type of work as garage work?

A. It depends on what you do.

Q. What machinery do you have?

A. We don't own any machinery.

Q. Do you grind valves?

A. We don't have any machinery.

A. No, sir. That is done out.

Q. Do you take the motor down so that the valves can be ground?

A. My father and brother do that.

Q. And you help them, don't you?

A. Yes.

Q. All right. That means taking the head off of the motor and working around the motor, does it not? A. Yes.

Q. Do you ever take any motors out?

A. We have got a chain block for that.

Q. I understand. You have chain blocks on board ships to lift heavy objects, to,, don't you?

(Testimony of Benjamin W. McNair.)

A. Sometimes; sometimes you don't.

Q. But you do work around whenever you have a car and assist them, don't you?

A. I help, yes.

Q. You have rather a number of calluses on your hands, don't you, from working around? [80]

A. I wouldn't say I have got a number. I have got two, I guess.

Q. And they are on both the right and the left hands, aren't they? A. Yes, sir.

Q. They indicate that you have been doing quite a bit of work, as the doctor stated, isn't that right, Mr. McNair?

A. Well, I couldn't determine his statement.

Q. You work out in your Dad's garden, don't you? A. No, sir; I don't have a garden.

Q. Do you work around the neighborhood?

A. No, sir.

Q. You haven't done any of that at all?

A. No, sir.

Q. At any time? A. No, sir.

Q. I thought you testified on direct examination that you had done some garden work but you couldn't handle it?

A. That wasn't in the neighborhood. That was out of town.

Q. When was that?

A. I don't remember the date, but that was out of town.

Q. Now, since you left the Barranoff, May 23rd, 1948, [81] have you attempted to go to sea?

(Testimony of Benjamin W. McNair.)

A. No, sir, I haven't.

Mr. Pellegrini: That is all.

(Certificate of Discharge marked Libelant's Exhibit 2 for identification.)

Redirect Examination

By Mr. Geisness:

Q. Showing you what has been marked Libelant's Exhibit 2, tell us what that is, will you?

A. That is a discharge from service that you have at sea.

Q. Is that your discharge from service on the Toloa? A. Yes, sir.

Q. Does that relate to the first voyage you took after you were injured?

A. Yes, sir. I believe that is the first one.

Q. Are you sure?

A. I am pretty positive it was around August that I took my first ship.

Q. That discharge indicates August 13th, 1945 as the date of shipment, does it not? [82]

A. Yes, sir.

Q. And what date does it indicate as the date of discharge? A. September 17th, 1945.

Q. Did you take another voyage on the Toloa immediately or what was the situation?

A. Oh, they stayed in Seattle for a few days, I believe.

Q. Then did you remain on the ship?

A. I went home. And then I was already on the ship and I just went home and waited until we were ready to go.

(Testimony of Benjamin W. McNair.)

Q. Do you know when they went again?

A. No, I am not positive.

Q. Do you have your discharge from the following voyage?

A. No, I haven't. I got one discharge two trips later for both of the trips. They were both short trips and they put it on one discharge.

Q. That discharge indicates that your first voyage was from August 13th, 1945 to September 17th, 1945. I understand from your testimony on cross-examination that you served on the Toloa from August 13th, 1945 to November 3, 1945, is that correct to the best of your knowledge?

A. We have some short trips in there. Yes, I think that is correct. [83]

Q. And from November 9th, 1945 to December 24th, 1945, is that correct to the best of your knowledge?

A. Yes, I think that is correct.

Q. But you don't have the discharge covering any of those voyages except the one that has been introduced in evidence or has been identified as Libelant's Exhibit 2?

A. Yes. I had one for those last two trips I told you. But I haven't had it now because it is lost.

Mr. Geisness: I think that is all.

The Court: How long did you pick apples?

The Witness: Oh, it was a week or two, sir.

The Court: You may continue your examination.

(Testimony of Benjamin W. McNair.)

Recross Examination

By Mr. Pellegrini:

Q. You had another trip on the Toloa starting January 10th, 1946 and ending February 28th, 1946, did you not,—in other words, you sailed on the Toloa in the first two months of 1946, did you not? A. I believe somewhere in there, yes.

Q. Those dates are approximately correct? [84]

A. Yes.

Q. You recall being on board the Toloa in the months of January and February, 1946, do you not?

A. It was around in there, sir. I couldn't tell you without looking it up.

Mr. Pellegrini: That is all.

The Court: Step down.

(Witness excused.)

(Letter dated March 25, 1947, marked Libelant's Exhibit 4 for identification.)

Mr. Geisness: The Libelant offers Libelant's Exhibits 3 and 4 in evidence unless there is some objection.

Mr. Pellegrini: They are parts of the Maritime Commission files relating to this matter, Your Honor.

The Court: Is there any objection?

Mr. Pellegrini: I have none.

The Court: Each of them, Libelant's Exhibits 3 and 4 is now admitted. [85]

LIBELANT'S EXHIBIT NO. 3

United States Maritime Commission
45 Broadway, New York 6, New York

October 23, 1946

Bassett & Geisness, Esquires
811 Alaska Building
Seattle 4, Washington

Gentlemen:

Re: Benjamin McNair
SS William Sharon

We have for acknowledgment your communication of October 9, 1946, also enclosure, all in connection with the above entitled matter.

Our records would indicate that the subject claimant, following his separation from the SS William Sharon, was repatriated to San Francisco, aboard the SS David Hewes, arriving March 2, 1945. We have no evidence in our file which would indicate that he was disabled from sea duty subsequent to his return to San Francisco.

In order that we may be in a position to further consider this seaman's claim, we would ask that you be kind enough to have him furnish us with a statement relative to his activities subsequent to March 2, 1945; also, furnish us with the names and addresses of hospitals and/or physicians who have treated Mr. McNair subsequent to his return to San Francisco, and a report of their findings.

On receipt of the above requested information, we will be glad to further consider this matter and advise you accordingly.

Very truly yours,

W. H. CANTWELL,

Chief Adjuster

Division of Insurance

By: /s/ J. P. WHELAN

[Stamp]: Copy received Oct. 29, 1946. Bassett & Geisness.

LIBELANT'S EXHIBIT NO. 4

United States Maritime Commission

45 Broadway, New York 6, New York

March 25, 1947

In reply, refer to: JPW:ch-M

Bassett & Geisness, Esquires

Second and Cherry, Seattle 4, Washington

Gentlemen:

Re: Benjamin McNair

SS William Sharon

Further to our correspondence relative to the above captioned case and particularly in reply to yours of February 10, 1947.

There has been no evidence presented to this office which would indicate that your client suffered disability to the extent that he was unable to continue his usual occupation. Under the circumstances, therefore, we regret that no consideration can be granted to Mr. McNair under our Second Seamen's War Risk Policy, as amended.

In the event that Mr. McNair suffers future periods of disability from sea employment, which can

be directly attributed to injuries he sustained as a result of enemy action during his employment aboard the SS William Sharon, he may make application for further consideration. In such instance, it will be necessary for him to furnish us with testimony from an United States Marine Hospital or Public Health Service Facility confirming any period of disability for which he claims compensation.

Very truly yours,

W. H. CANTWELL,

Chief Adjuster

Division of Insurance

By: /s/ J. P. WHELAN

[Stamp]: Copy received Mar. 28, 1947.

(Libelant's Exhibit 3 received in evidence.)

(Libelant's Exhibit 4 received in evidence.)

LEO L. McNAIR,

called as a witness by and on behalf of the Libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Geisness:

Q. Will you state your full name, please?

A. Leo L. McNair.

Q. Is Benjamin W. McNair, the libelant here, your son? A. Yes, sir.

Q. Where does he live?

A. Redmond, Washington.

Q. With you? A. Yes, sir.

(Testimony of Leo L. McNair.)

Q. How long has he lived there?

A. All of his life.

Q. Apparently he has been away at sea part of the [86] time? A. That is right.

Q. But he has made his home there while he has been away? A. That is right.

Q. Do you remember the occasion of his return after he was injured in December, 1944,—do you remember the time when he returned in March, 1945?

A. Yes. I have a fair recollection of his return.

Q. Were you at home then?

A. That is right.

Q. Was he able to work at that time he returned? A. I would say no.

Mr. Pellegrini: I object and move that the answer be stricken. I have no objection to the witness testifying what he observed.

The Court: The objection is sustained and the answer is stricken and the Court will disregard it.

Q. (By Mr. Geisness): After he returned in March, 1945, where did he live?

A. He lived at home.

Q. Do you remember when he first did any work?

A. No, I couldn't say exactly. I brought him back and forth to the Marine Hospital for outpatient [87] treatment.

Q. He has testified concerning his going to sea.

Do you remember the occasion of his going to sea after that injury?

(Testimony of Leo L. McNair.)

A. No, I wouldn't have the dates offhand. I think his discharge would come nearer getting that accurate. I believe what he stated is about right,— I believe it was some time in August that he sailed after his injury.

Q. Do you know what if any work he has done since that time?

A. I think he has stated he has helped me some. I do some mechanical work. I have no garage. I do an occasional job when one comes around,— people that know me and want me to do their work. He has helped me some. And his apple-picking, last year I believe it was, was of very short duration apparently. It possibly could have been two weeks. I don't just know exactly offhand.

Q. Do you pay him when he works for you or what is the arrangement?

A. Occasionally I give him a little money, sure, if we happen to have a little surplus money.

Q. Do you have any fixed rate of pay that you pay him? A. Oh, no, absolutely not. [88]

Q. Do you know of any outside work he has done except the apple picking and work on those ships?

A. No, I can't say offhand I do. He has had no regular jobs I know.

Q. How has his condition appeared to you since he returned? Of course, it may be at different times, but I wonder if you can give us an idea over the whole time, from time to time, as to how he appeared.

(Testimony of Leo L. McNair.)

Mr. Pellegrini: I object to the question, if the Court please.

The Court: Read the question.

(Last question repeated by the reporter.)

The Court: Objection overruled.

A. Well, to begin with,—at least before he sailed the first time on the *Tolosa*, I have seen the boy pass completely out from nervous exhaustion. However, I don't think he does that any more. I haven't noticed his condition as being such recently. He is, however, a highly nervous sort.

Now, whether the injury has anything to do with that—and the action that he seen in the Philippines—I don't know. I know we didn't feel he was of a nervous sort before he ever went to work. Now, I am not in a position to say [89] just what reaction he has to that injury.

Q. (By Mr. Geisness): Have you noticed anything about the condition of his right arm and his use of it?

A. Normally I would say he uses his right arm practically as good as any one outside of perhaps some excessive strain or exertion. I am quite convinced that he does have some trouble there if he exerts himself or, as I said, under an excessive strain.

Q. Have you noticed any change in the use of that arm for the months or years now since he returned?

(Testimony of Leo L. McNair.)

A. I would say yes. I think it is a great deal better than it was.

Mr. Geisness: I think that is all.

Mr. Pellegrini: No cross-examination.

The Court: You may be excused.

(Witness excused.)

The Court: Call the next witness.

Mr. Geisness: Libelant rests, if the court please.

Mr. Pellegrini: Respondent rests, if the Court please.

The Court: Did anyone want to offer [90] Libelant's Exhibit 2?

Mr. Geisness: No, Your Honor. I only wanted to use it for refreshing the witness' recollection.

The Court: Is there any exhibit not admitted which proctors wish the Court to admit? My record shows all of the rest of the exhibits admitted.

Hearing no response to the Court's question,—let the record show that each of the parties now rests.

How long do you wish to argue?

(Final arguments heard by the Court on behalf of Libelant and Respondent, respectively.)

COURT'S DECISION

The Court: The Court considers this a hard case to decide upon the facts and evidence here brought before the Court.

I believe implicitly that Dr. Mackay was trying his best to be fair and to tell the truth as he understood it.

I also think that the other doctor, Dr. Wagner, was doing the same thing. And I think this libelant, himself, while on the witness stand, was a frank and honest witness.

My understanding of the evidence, however, is that this libelant was not disabled from making reasonable performance of his duties as a member of the black gang in the engine room as long as is now contended in his behalf.

I also think that the reasonable length of his reasonable disability in the attempted performance of his duties was longer than the government contends for.

I believe it fair and reasonable, from a preponderance of all of the evidence in this case, for the Court to find, and the Court does [92] now find from such preponderance, that the libelant was reasonably disabled from performing the duties ordinarily called for in the performance of black gang membership duties for the period of one year beginning March 2, 1945, and no more, and that in addition thereto he is entitled to recover the sum of \$325.00 on account of a permanent loss of the 10 percent of functioning which, however, does not disable him, making him in all a recovery in the total sum of \$1,525; and in addition thereto his costs and disbursements in this action to be taxed by the Clerk.

Mr. Pellegrini: Your Honor is dating that from March 2, 1945?

The Court: March 2nd. That means for the month of March he is entitled to \$100, and for each month thereafter for twelve months.

Mr. Pellegrini: If I may have an exception to Your Honor's ruling.

The Court: Exception allowed.

I am going to state one further detail in above

I am going to state one further detail in discussing this matter. The Court is convinced as above stated, because I think the libelant went back to work in the Alaska trade before he was entirely recovered from his disability respecting performance [93] by him of black gang membership duties. I believe, however, that from the standpoint of his ability to do the black gang membership work ordinarily required of members of that gang, his disability did not continue as long as he claims it **did**; at least the evidence in support of his contention that it continued up to the time he filed this action on September 4th, 1947 and later is not sufficiently convincing to the Court to make a finding favorable to him,—particularly in view of the fact that he did perform gainful service on board ships and in connection with his father's automobile repair work in the field of mechanics, where there wasn't any improved machinery used in his father's business, a circumstance which must call for a greater amount of hard physical labor by reason of the absence of machinery; and then by reason of the fact that he worked on that apple-picking job and notwithstanding the fact that he said he quit because he didn't succeed as well as he thought he ought to.

The Court is not greatly impressed by the circumstances surrounding his picking apples. His lack of complete success at apple picking may have

been due in part to his lack of aptitude in that [94] particular work rather than to his physical disability.

(Concluded.)

(At 11:15 a.m., Wednesday, April 21, 1948,
proceedings concluded.) [95]

CERTIFICATE

I, Merritt G. Dyer, Official Reporter for the United States District Court, hereby certify that as such official reporter I recorded the foregoing proceedings stenographically and the same have been reduced to typewriting under my personal supervision.

I further certify that the foregoing record is a full, true and correct transcript of the proceedings occurring therein.

/s/ MERRITT G. DYER,

Official Court Reporter.

[Endorsed]: Filed Dec. 7, 1948.

[Endorsed]: No. 12121. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Benjamin W. McNair, Appellee. Apostles On Appeal. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed December 10, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

In Admiralty—No. 12121

UNITED STATES OF AMERICA,

vs. Appellant,

BENJAMIN W. McNAIR,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF PARTS OF RECORD
To the Honorable Judges of the above entitled
Court:

Appellant herein, United States of America, hereby refers to and adopts as its Statement of Points on which it intends to rely upon appeal, the assignments of error included in the apostles on appeal heretofore transmitted to this Court; and

The said appellant hereby designates that the entire record (apostles on appeal) heretofore transmitted to the Court in this action, except Appellant's Exhibit A-4 (Hospital records, Marine Hospital, Seattle) be printed, together with this designation and adoption of Statements of Points on appeal.

Respectfully submitted,

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ FRANK PELLEGRINI,
Assistant United States Attorney.

(Acknowledgment of Service)

[Endorsed]: Filed January 13, 1949. Paul P. O'Brien, Clerk.